(11)

No. 93-1151-CFX
Status: GRANTED

Title: Federal Election Commission, Petitioner
v.
NRA Political Victory Fund, et al.

Docketed:
January 18, 1994

Court: United States Court of Appeals for
the District of Columbia Circuit

See also:
93-966

Counsel for petitioner: Bader,Richard B.

Counsel for respondent: Cooper,Charles J., Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jan 18 1994	G	Petition for writ of certiorari filed.
2	Jan 18 1994	D	Motion of petitioner to expedite consideration of the petition filed.
3	Jan 24 1994		Motion of petitioner to expedite consideration of the petition DENIED. Justice Ginsburg OUT.
4	Feb 17 1994		Brief of respondents NRA Political Victory Fund, et al. in opposition filed.
5	Feb 23 1994		DISTRIBUTED. March 18, 1994 (Page 1)
6	Feb 28 1994	X	Reply brief of petitioner filed.
7	Mar 21 1994	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice Ginsburg OUT.
8	May 27 1994		Brief amicus curiae of United States filed.
10	May 31 1994		Brief of petitioner Federal Election Commission in response to brief amicus curiae of United States filed.
11	Jun 1 1994		REDISTRIBUTED. June 17, 1994 (Page 1)
12	Jun 20 1994		Petition GRANTED. Justice Ginsburg OUT.
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13	Aug 4 1994		Brief of petitioner Federal Election Commission filed.
14	Aug 4 1994		Joint appendix filed.
15	Aug 4 1994		Lodging consisting of 12 copies of FEC Annual report.
16	Aug 4 1994		Brief amicus curiae of United States filed.
23	Aug 19 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the District of Columbia Circuit.
18	Aug 23 1994	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Sep 6 1994		Brief of respondents NRA Political Victory Fund, et al. filed.
22	Sep 7 1994		Record filed.
		*	Original record proceedings United States District Court for the District of Columbia (BOX)
20	Sep 9 1994		CIRCULATED.
21	Sep 12 1994		SET FOR ARGUMENT TUESDAY, OCTOBER 11, 1994. (1ST CASE).
24	Sep 26 1994		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Ginsburg OUT.

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No. 93-

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

NRA POLITICAL VICTORY FUND, ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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January 18, 1994

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Constitution's separation-of-powers requirement is violated by the inclusion on the Federal Election Commission of two *ex officio* members selected by the Congress, where the statute denies them the right to vote and requires that all decisions on the exercise of the Commission's executive powers be made by majority vote of six Commissioners appointed by the President in conformity with Article II, Sec. 2, Cl. 2 of the Constitution.

2. Whether, if question 1 is answered in the affirmative, the actions taken pursuant to statutory authority by the Commission over the course of almost two decades prior to this decision should be accorded *de facto* validity, as this Court did when it found the structure of the original Commission unconstitutional in *Buckley v. Valeo*, 424 U.S. 1 (1976).

STATEMENT NAMING ADDITIONAL PARTIES

Named parties not reflected in the caption are respondent GRANT A. WILLS, as Treasurer of the NRA Political Victory Fund, and respondent NATIONAL RIFLE ASSOCIATION-INSTITUTE FOR LEGISLATIVE ACTION.

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PETITION FOR A WRIT OF CERTIORARI

The Federal Election Commission ("the Commission" or "FEC") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Federal Election Commission v. NRA Political Victory Fund, et al.*, 6 F.3d 821 (D.C. Cir. 1993).

OPINIONS BELOW

The October 22, 1993, decision of a panel of the court of appeals reversed the district court's judgment in favor of the Commission in this civil law enforcement proceeding. In doing so, the court found that 2 U.S.C. § 437c(a)(1) violates the constitutional requirement of separation of powers in providing for

the inclusion on the Commission of two *ex officio* members, with no right to vote on the exercise of the Commission's powers, who are selected by the Congress. The court then reversed the district court's judgment without reaching the merits of the violations found by the district court, on the ground that an agency whose structure violates the Constitution cannot conduct civil law enforcement litigation.

The appellate court's opinion, as amended October 25, 1993, is reported at 6 F.3d 821 (D.C. Cir. 1993), and is reprinted as Appendix A (App. 1a-18a), bound with this petition. The district court's November 15, 1991, opinion and order are reported at 778 F. Supp. 62 (D.D.C. 1991), and appear, as amended December 10, 1991, in Appendix B (App. 19a-35a).

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The Federal Election Campaign Act of 1971, as amended ("the Act"),[1] codified at 2 U.S.C. §§ 431-

[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475; by the Social Security Amendments of 1977, Pub. L. No. 95-216, Title V, Sec. 502, 91 Stat. 1565; by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980); by the Trademark Clarification Act of 1984, Pub. L. No. 98-620, Title IV, Sec. 402, 98 Stat. 3357; by Pub. L. No. 100-352, Sec. 6(a), 102 Stat. 663 (1988); by Pub. L. No. 101-

455, establishes the Commission as an independent agency with exclusive jurisdiction over the administration and civil enforcement of the Act. 2 U.S.C. § 437c(b)(1). The Act provides that "[t]he Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate." 2 U.S.C. § 437c(a)(1). The court of appeals found unconstitutional the part of section 437c(a)(1) that includes on the Commission the two nonvoting *ex officio* members selected by Congress. Appendix F (App. 42a-67a) sets out in full 2 U.S.C. § 437c and other provisions of the Act describing the Commission's structure, powers, and duties.

STATEMENT OF THE CASE

A. The Federal Election Commission

The Commission is the independent agency of the United States Government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Act. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), (e), and 437g. The Commission has six voting members appointed to staggered six-year terms by the President, with the advice and consent of the Senate. 2 U.S.C. §§ 437c(a)(1), 437c(a)(2)(A). No more than three of these members may be affiliated with the same political party. 2 U.S.C. § 437c(a)(1). The affirmative votes of at least four of these six members are required for any official

194, Title VI, Sec. 601(b)(1), 103 Stat. 1762 (1989); by Pub. L. No. 101-280, Sec. 7(b)(1), 104 Stat. 161 (1990); and by Pub. L. No. 102-90, Title I, Sec. 6(d), 105 Stat. 451 (1991).

Commission action, and a voting Commissioner "may not delegate to any person his or her vote or any decision-making authority or duty vested in the Commission," 2 U.S.C. § 437c(c). Affirmative votes of four of these six Commissioners are specifically required for finding that there is "reason to believe" a violation of the Act has occurred, which initiates a Commission investigation, 2 U.S.C. § 437g(a)(2), or finding that there is "probable cause to believe" that a violation has occurred, which leads to mandatory conciliation efforts. 2 U.S.C. §§ 437c(c), 437g(a)(4). If conciliation fails, the Commission, upon the affirmative vote of at least four of these six Commissioners, may decide to file a *de novo* civil enforcement suit, like the present case. 2 U.S.C. § 437g(a)(6)(A).

Section 437c(a)(1) also includes on the Commission two additional officials, the Secretary of the Senate and the Clerk of the House of Representatives, or their designees. The statute specifies, however, that these two officials serve only in an *ex officio* capacity, do not have the right to vote on the exercise of any of the Commission's powers, and may not serve as chairman or vice chairman of the Commission. 2 U.S.C. § 437c(a)(1), (5). The Commission's procedural rules, adopted pursuant to 2 U.S.C. § 437c(e), deny the *ex officio* members such procedural rights as calling a meeting, voting to adjourn or to select a presiding officer in the absence of the chairman, and being counted in determining the presence of a quorum. Commission Directive No. 10, *Rules of Procedure of the Federal Election Commission*, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 2043, at 2512-2514 (July 13, 1978).

B. The NRA Violated 2 U.S.C. § 441b By Contributing More Than $400,000 In Corporate Funds To Its Separate Segregated Fund

The Act prohibits a corporation from making "a contribution or expenditure in connection with any federal election," 2 U.S.C. § 441b.[2] The Act also prohibits political committees from knowingly accepting such corporate contributions, 2 U.S.C. § 441b(a). A limited exception to this prohibition permits a corporation to use its general treasury funds for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by [the] corporation," 2 U.S.C. § 441b(b)(2)(C), so long as the contributions to the fund are solicited only from the corporation's stockholders and executive or administrative personnel and their families, 2 U.S.C. § 441b(b)(4)(A), and from a membership corporation's members, 2 U.S.C. § 441b(b)(4)(C). If a separate segregated fund chooses instead to expend its own funds for such administrative or solicitation expenses, the connected corporation may reimburse the fund for these expenditures "no later than 30 calendar days after the expense was paid by the separate segregated fund." 11 C.F.R. § 114.5(b)(3).

The National Rifle Association ("NRA") is a nonprofit membership corporation that operates a separate segregated fund, established pursuant to 2 U.S.C. § 441b(b)(2)(C), called NRA Political Victory Fund ("PVF"). (App. 20a.) PVF is registered

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[2] For purposes of this corporate prohibition, "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value" is a "contribution or expenditure." 2 U.S.C. § 441b(b)(2).

with the Commission under 2 U.S.C. § 431(4) as a multi-candidate political committee that contributes to federal candidates.

In March and July 1988, a division of NRA used corporate funds to produce and mail to NRA members letters soliciting contributions to PVF. (App. 20a.) On August 1, 1988, PVF transferred to this NRA division $415,744.72, an amount equal to the combined cost of the solicitations. (App. 20a-21a.) Later, respondent Grant A. Wills, who was both PVF's treasurer and the NRA division's fiscal officer, concluded that because PVF's expected revenues had not met projections PVF had insufficient funds for the political contributions and expenditures NRA wanted to make during the upcoming election campaign. (App. 22a, 23a.) To remedy this deficit, the NRA division transferred $415,744.72 of its corporate funds to PVF on October 20, 1988, just 19 days before the November 8, 1988, election. (App. 21a.) PVF quickly converted these corporate funds into political contributions and expenditures. (App. 3a.)[3]

C. The Administrative Proceedings

In October 1989, by an affirmative vote of at least four of the presidentially appointed Commissioners, the Commission found "reason to believe," 2 U.S.C. § 437g(a)(2), that the respondents had violated 2 U.S.C. § 441b(a) as a result of the NRA division's October 20, 1988, transfer to PVF of $415,744.72 in corporate funds. *See* App. C. After an investigation, the Commission, by an affirmative vote of at least

[3] In the 18 days after the October 20th transfer of corporate funds to PVF, PVF made more than $262,000 in direct and in-kind contributions to 110 federal candidates in 38 states.

four of the presidentially appointed Commissioners, found "probable cause to believe," 2 U.S.C. § 437g(a)(4)(A)(i), that the respondents had violated the provision. *See* App. D. When conciliation attempts failed, the Commission, by an affirmative vote of at least four of the presidentially appointed Commissioners, authorized the filing of the present civil enforcement action. 2 U.S.C. § 437g(a)(6)(A). *See* App. E. At no time during the administrative proceedings did NRA object to the participation of the *ex officio* members, request their exclusion from the case, or question the Commission's constitutional authority to conduct the proceedings or make any of these determinations.

D. The Proceedings in the District Court

On cross-motions for summary judgment, the district court found that the October 20 transfer of money was too late under the Commission's regulations to be a lawful reimbursement for solicitation expenditures (App. 22a) and was "intended to bolster the PVF's accounts for its campaign-related activities in support of particular candidates" (App. 23a). Accordingly, the district court held that the transfer of $415,744.72 in corporate funds to PVF was a corporate contribution that violated 2 U.S.C. § 441b. (App. 24a.) The court assessed a $40,000 civil penalty (App. 33a) and enjoined the defendants from repeating their violations, finding that "the NRA defendants acted deliberately to circumvent prescribed reimbursement and contribution requirements" (App. 33a) and that their arguments "would make a mockery of the campaign finance laws" (App. 33a).

NRA raised several affirmative constitutional defenses, among which was the claim that Congress violated the Constitution's separation-of-powers requirement by placing the Secretary of the Senate and the Clerk of the House, or their designees, on the Commission in a nonvoting, *ex officio* capacity. The district court concluded that this argument provided no defense in this civil law enforcement suit because NRA had neither alleged nor provided evidence that the congressional employees, serving at the Commission only in a nonvoting, *ex officio* capacity, had affected any of the Commission's actions against the NRA. (App. 26a.) Accordingly, the court found that NRA had failed to show a sufficient stake in the resolution of this constitutional issue to require the court to resolve it in this lawsuit. The court also noted, however, that because the Secretary of the Senate and the Clerk of the House have no vote, they "have no real say in the outcome of any Commission proceedings" (App. 26a).

E. The Proceedings in the Court of Appeals

A two-judge panel of the D.C. Circuit reversed the district court's judgment.[4] The court did not reach the merits of the violation found by the district court, but instead addressed only NRA's constitutionally based attacks on the Commission. (App. 4a.) The court found NRA's other constitutional attacks on the Commission to be either wrong or nonjusticiable in the circumstances of this case (App. 8a-12a), but it found that the Commission's structure violated the

[4] Justice Ginsburg sat on the appellate panel that heard oral argument in this case, but "did not participate in [the court's] opinion" (App. 1a n.*).

constitutional separation-of-powers doctrine in that "Congress exceeded its legislative authority when it placed its agents, the Secretary of the Senate and the Clerk of the House of Representatives, on the independent Commission as non-voting *ex officio* members" (App. 2a).

The court of appeals explicitly acknowledged that its holding went beyond any of this Court's prior precedents, because the congressional agents whose roles this Court had previously found to violate separation of powers always "possessed explicit voting or decisionmaking power that is not present here" (App. 15a). But the court found the lack of any power to vote on the exercise of the Commission's executive powers to be of no significance. "Even if the *ex officio* members were to remain completely silent during all deliberations . . . , their mere presence as agents of Congress conveys a tacit message to the other Commissioners. The message may well be an entirely appropriate one—but it nevertheless has the potential to influence the other Commissioners" (App. 13a-14a). Thus, "the mere presence of agents of Congress on an entity with executive powers offends the Constitution" (App. 15a).

> The Constitution . . . "anticipates that the coordinate Branches will converse with each other on matters of vital common interest." *Mistretta v. United States*, 488 U.S. 361, 408 (1989). The Commission argues that Congress intended *ex officio* membership to fulfill this coordinating function by having the Secretary and the Clerk play a mere "informational or advisory role" in agency decisionmaking. Advice, however, surely implies influence, and Congress must limit the

> exercise of its influence, whether in the form of advice or not, to its legislative role.

(App. 15a.)

The court then held that, under the Act's severability clause, 2 U.S.C. § 454, "the unconstitutional *ex officio* membership provision can be severed from the rest of [the Act]," so that "Congress is not even required after our decision, as it was after *Buckley* [*v. Valeo*, 424 U.S. 1 (1976),] to amend the statute" (App. 17a, 16a). But the court rejected the Commission's argument that, regardless of whether the *ex officio* provision is constitutional, the civil law enforcement action against NRA should be preserved under the *de facto* officer doctrine. (App. 17a-18a.) The court acknowledged that this Court had applied the *de facto* officer doctrine to validate the Commission's past actions in *Buckley* when it found the Commission's structure, which then included four *voting* Commissioners appointed by Congress, violated the Constitution's separation-of-powers requirement. (App. 17a.) But the court of appeals found *Buckley* distinguishable because the relief sought in that declaratory judgment case "could have purely prospective impact," while in the context of an affirmative defense to an enforcement suit no prospective relief is available, and the court could not "declare the Commission's structure unconstitutional without providing relief to the appellants in this case" (App. 17a, 18a).

On October 26, 1993, the Commission voted to reconstitute itself as a six-member agency without *ex officio* members in accord with the court of appeals decision, subject to further action by this Court. The reconstituted Commission has devoted a large

part of its resources to ratifying or reconsidering its prior actions in all ongoing proceedings in an effort to continue to administer and enforce the Act as effectively as possible under the restrictions of the decision below. The adequacy of the Commission's efforts to comply with this decision has been challenged so far in four cases in district courts and three cases at the appellate level.

REASONS FOR GRANTING THE WRIT

The decision below not only found a federal statute unconstitutional, but invalidated the composition of the federal agency Congress vested with exclusive jurisdiction for the administration and civil enforcement of the Federal Election Campaign Act of 1971, as amended,[5] 2 U.S.C. §§ 431-455, and the statutes governing public financing of presidential election campaigns, 26 U.S.C. §§ 9001-9042. The rationale for this decision was an expansive view of the Constitution's separation-of-powers requirement, that, as the court below candidly conceded (App. 15a), goes beyond anything sanctioned by this Court.[6] Moreover, as we show *infra*, pp. 18-19, two other circuits have rejected the position adopted below that the Constitution prohibits giving an agent of Congress a statutory role carrying the potential to influence, but not to control or overrule, executive decisionmakers.

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[5] See *supra*, n.1.

[6] In 1988 Congress eliminated most of this Court's mandatory appellate jurisdiction, *see* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988), on the understanding that "[u]nder usual circumstances, any lower Federal court decision invalidating an act of Congress presents issues of great public importance warranting Supreme Court review." H.R. Rep. No. 100-660, 100th Cong., 2d Sess. 9 (1988).

In addition, even if the court's constitutional holding were correct, its failure to affirm the *de facto* validity of the Commission's actions in administering these laws for almost two decades prior to this decision conflicts with this Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976). It also imperils unnecessarily the current enforcement of the federal campaign finance statutes, which this Court has previously found to serve the compelling public interests in deterring corruption of elected officials and preserving the integrity of the federal election process. Such a decision should not be allowed to stand without plenary review by this Court.

I. SEPARATION OF POWERS IS NOT VIOLATED BY THE INCLUSION OF NONVOTING *EX OFFICIO* MEMBERS ON THE FEDERAL ELECTION COMMISSION

While this Court has repeatedly "reaffirmed the importance in our constitutional scheme of the separation of powers into the three coordinate branches," the Court has "never held that the Constitution requires that the three Branches of Government 'operate with absolute independence.'" *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988) (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974)). To the contrary, the "principle of separation of powers anticipates that the coordinate Branches will converse with each other on matters of vital interest." *Mistretta v. United States*, 488 U.S. 361, 408 (1989).

What the Constitution mandates is not "a hermetic division between the Branches," but a "'safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Mistretta*, 488 U.S. at 381-82 (quoting *Buckley v. Valeo*, 424 U.S. at 122). Thus, the Court has "invalidated attempts

by Congress to exercise the responsibilities of other Branches or to reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch" but has "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." *Id.*

The inclusion of the *ex officio* members on the Federal Election Commission does not violate this principle because the statute vests them with no authority to determine how the Commission exercises any part of its executive powers. Following this Court's decision in *Buckley v. Valeo*, 424 U.S. at 109-141, that the appointment of the voting Commissioners by Congress was unconstitutional, Congress amended the Act to provide that all six members of the Commission authorized to vote on the exercise of its powers must be nominated by the President and confirmed by the Senate in accord with the Constitution's Appointments Clause, art. II, § 2, cl. 2. 2 U.S.C. § 437c(a)(1). Congress went to great lengths to specify that the power to administer and enforce the Act is vested exclusively in these six Commissioners appointed by the President. The statute explicitly provides that the *ex officio* members are "without the right to vote," 2 U.S.C. § 437c(a)(1), and requires that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission." 2 U.S.C. § 437c(c).[7] The statute also specifies that a Commis-

[7] The statute reemphasizes this restriction on the exercise of the Commission's civil law enforcement powers. *See* 2 U.S.C. § 437g(a)(2), (4), (6).

sioner "may not delegate to any person his or her vote or any decision-making authority or duty vested in the Commission by the provisions of this Act," 2 U.S.C. § 437c(c). By so carefully reserving all authority to the six Commissioners appointed by the President, the Act effectively precludes the *ex officio* members from controlling, or even participating in, the exercise of the Commission's executive powers.[8]

The only authority the statute gives the *ex officio* members is to express their views to the voting Commissioners during Commission meetings. The voting Commissioners are, however, free to disregard the advice of the *ex officio* members with impunity and to cast their votes to exercise the Commission's powers as they see fit. The statute thus gives the *ex officio* members no ability to interfere in any way in the exercise of the Commission's powers by the six Commissioners appointed by the President.

The court of appeals conceded that this Court has only found the separation-of-powers doctrine violated when Congress or its agents "possessed explicit voting or decisionmaking power that is not present here" (App. 15a). It proceeded nevertheless to rule that the statute's denial of any power over executive action to the *ex officio* members is insufficient to

[8] The Act also prohibits the *ex officio* members from serving as chairman or vice chairman, 2 U.S.C. § 437c(a)(5), and under the Commission's procedural rules they are denied the rights to call a meeting, to vote either to adjourn or to select a presiding officer in the absence of the chairman, or even to be counted in determining a quorum. See Commission Directive No. 10, *Rules of Procedure of the Federal Election Commission*, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 2043, at 2512-2514 (July 13, 1978).

satisfy the Constitution because the voting Commissioners might be influenced in their decisions by the views of the *ex officio* members:

> Even if the *ex officio* members were to remain completely silent during all deliberations (a rather unlikely scenario), their mere presence as agents of Congress conveys a tacit message to the other commissioners. The message may well be an entirely appropriate one—but it nevertheless has the potential to influence the other commissioners.

(App. 13a-14a.) The court did not identify what this tacit message might be or how it might interfere with the voting Commissioners' ability to exercise their executive powers as they see fit.

In contrast to the court of appeals, this Court has consistently applied the "separation of powers" doctrine, as its name suggests, solely as a restriction on the distribution of governmental *power* within our constitutional system. In each case, this Court has found it necessary to analyze carefully the nature of the legal powers conferred upon the Congress or its agents by a statute alleged to violate the separation-of-powers principle.[9] This Court has never viewed

[9] *See, e.g., Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S.Ct. 2298, 2312 (1991) ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it"); *Morrison v. Olson*, 487 U.S. at 694 ("Congress retained for itself no powers of control or supervision over an independent counsel"); *Bowsher v. Synar*, 478 U.S. 714, 732 (1986) ("[B]ecause Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers. The remaining question is whether the Comptroller General has been assigned such powers"); *Buckley v.*

this principle as a restriction on statutory opportunities for members of one branch to influence another branch's exercise of its own constitutional powers by the mere conveying of messages, tacit or otherwise. Indeed, this Court has twice applied separation-of-powers analysis to federal commissions, including the Federal Election Commission, with *ex officio* members from another branch, but has never found the inclusion of *ex officio* members relevant to the constitutional question. *Buckley v. Valeo*, 424 U.S. at 113 (The Commission "consists of eight members" including two "*ex officio* members without the right to vote") and at 137 ("the ultimate question is which, if any, of those powers may be exercised by the present voting Commissioners"); *Mistretta*, 488 U.S. at 368 ("The Attorney General, or his designee, is an *ex officio* non-voting member" of the Sentencing Commission).

In sum, the separation-of-powers doctrine does not authorize courts to invalidate statutes out of a general wariness of Congress's ability to " 'mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments' " (App. 15a, quoting *The Federalist* No. 48, at 334 (J. Madison) (J. Cooke ed. 1961)). What the separation-of-powers doctrine requires is not that decision-makers in each branch must be insulated from being influenced by views expressed by members of another branch, but that " 'each of the three general departments of government [must remain] entirely free from the *control* or *coercive influence*, direct or in-

Valeo, 424 U.S. at 137 ("[T]he ultimate question is which, if any, of [the Federal Election Commission's] powers may be exercised by the present voting Commissioners").

direct, of either of the others,' " *Mistretta*, 488 U.S. at 380 (emphasis added, quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)).

> To forestall the danger of encroachment "beyond the legislative sphere," the Constitution imposes two basic and related constraints on the Congress. It may not "invest itself or its Members with either executive power or judicial power." . . . And, when it exercises its legislative power, it must follow the "single, finely wrought and exhaustively considered, procedures" specified in Article I.

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S.Ct. 2298, 2311 (1991) (citations omitted). The Act violates neither of these constraints. There is no contention that Congress has exercised its legislative power through the *ex officio* members of the Commission, and we have shown above—and the court of appeals agreed—that Congress did not vest the *ex officio* members with any executive power. Under this Court's precedents, that is enough to satisfy the Constitution.[10]

[10] As Assistant Attorney General in 1976, Justice Scalia cited the separation-of-powers doctrine in testifying in support of the Ford Administration's opposition to retaining the *ex officio* members when the Commission was reconstituted following this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). *See Federal Election Campaign Act Amendments, 1976: Hearing Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 94th Cong., 2d Sess. 103, 119, 135, 137 (1976), *reprinted in* FEC, *Legislative History of Federal Election Campaign Act Amendments of 1976*, at 109, 125, 141, 143 (1977). As shown in the text, however, this Court's later precedents have

Two other courts of appeals have rejected the view adopted by the court below that the Constitution is violated by a statute providing an agent of Congress with an opportunity to influence, but not to control or overrule, executive decisionmakers. *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1106-1108 (9th Cir. 1988), *rev'd on a different issue*, 893 F.2d 205 (9th Cir. 1989) (en banc), and *Ameron, Inc. v. United States Army Corps of Engineers*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988), involved challenges under the separation-of-powers doctrine to the provision in the Competition in Contracting Act of 1984 ("CICA"), 31 U.S.C. §§ 3551-56, authorizing the Comptroller General, an agent of Congress, to issue formal recommendations to executive agencies on the disposition of protests by disappointed bidders for federal contracts. To ensure that the Comptroller General has an adequate opportunity to investigate and make a recommendation before a final decision, CICA imposes an automatic stay of any contract award once a bid protest is lodged. 31 U.S.C. § 3553(c)(1), (d)(1).

Both courts concluded that the separation-of-powers doctrine is not violated by a statute that only requires executive decisionmakers to consider, but not to accept, the Comptroller General's views. In the Ninth Circuit's view, "the critical issue is whether Congress or its agent seeks to *control* (not merely to 'affect') the execution of its enactments without respect to the Article I legislative process . . . . If Congress 'in effect has retained control,' its action and the statutory provision on which it is based is unconstitutional." *Lear*

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adopted a separation-of-powers test inconsistent with the approach suggested in this testimony almost two decades ago.

Siegler, 842 F.2d at 1108 (emphasis in original). The Third Circuit similarly concluded that "Congress has the authority" to permit an agent of the legislature "to influence the executive's execution of the laws through the powers of public illumination and persuasion." *Ameron*, 809 F.2d at 993. Emphasizing that under CICA executive decisionmakers are "free to refuse to implement any and all of the Comptroller General's recommendations" and that the statute leaves "final control over procurement decisions to the executive," 809 F.2d at 995, 998, the Third Circuit concluded, *id.* at 998:

> Like other political mechanisms built on the basis of the doctrine of separation of powers, CICA encourages the branches to work together without enabling either branch to bind or compel the other. That is the way a government of divided and separated powers is supposed to work.

We submit that the Third and Ninth Circuits have construed this Court's separation-of-powers jurisprudence correctly, and that the court below was wrong in its admittedly unprecedented extension of the doctrine to bar Congress from placing its agents in a position to try to exert persuasive influence upon, but not to bind or control, the actions of executive decisionmakers.[11] But regardless of which view this

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[11] There are, of course, instances when congressional attempts to influence executive administrators can exceed lawful bounds, but the courts have required substantial proof of improper pressure on a decisionmaker and of prejudice in a particular case before relief will be provided. *See, e.g., DCP Farms v. Yeutter*, 957 F.2d 1183, 1187-88 (5th Cir.), *cert. denied*, 113 S. Ct. 406 (1992), and cases discussed therein; *Chemung County v. Dole*, 804 F.2d 216, 221-222 (2d Cir. 1986). As the district court emphasized (App. 26a), NRA

Court ultimately adopts, there can be no doubt that this novel extension of constitutional law to invalidate the structure of an independent agency established by Congress to administer statutes designed to protect the integrity of the federal electoral system is of sufficient national importance to warrant review by this Court.

II. THE COMMISSION'S PAST ACTIONS SHOULD BE ACCORDED *DE FACTO* VALIDITY

The court of appeals found (App. 17a, 16a) that "the unconstitutional *ex officio* membership provision can be severed from the rest of" the Act, so that "Congress is not even required after our decision . . . to amend the statute" in order to provide for the continuing administration of the Act by a reformed Commission. The court acknowledged that in *Buckley v. Valeo*, 424 U.S. at 142, this Court found the Commission's past actions to be *de facto* valid even though it had invalidated the Commission's structure on separation-of-powers grounds. The court of appeals decided nonetheless simply to reverse the district court's judgment against NRA without regard to the merits because the court was "aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case" (App. 18a). Even if this Court affirms the finding of the court of appeals that the inclusion of *ex officio* members on the Commission is unconstitutional, the Court should

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did not even try to make such a showing in this case. Indeed, there was nothing in the record before the court of appeals in this case indicating whether the *ex officio* members participated in, or were even present during, agency deliberations.

reaffirm its holding in *Buckley* and accord *de facto* validity to the Commission's actions in administering and enforcing the campaign finance statutes for almost two decades prior to this decision, pursuant to the explicit authorization of the Act. This would permit a reformed Commission to pick up where the old Commission left off in the orderly administration and enforcement of these important statutes.

As the court of appeals recognized (App. 17a), this Court's affirmance of the *de facto* validity of the Commission's actions in *Buckley*, 424 U.S. at 142, even after ruling that the Commission would have to be changed to conform with the Constitution if it was to continue in operation beyond a brief transition period, was a reflection of the *de facto* officer doctrine long recognized by this Court. Under that doctrine, " 'where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.' " *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (quoting *McDowell v. United States*, 159 U.S. 596, 602 (1895)).[12] *See also, e.g., United States v. Royer*, 268 U.S. 394, 397 (1925); *Waite v. Santa Cruz*, 184 U.S. 302, 323 (1902); *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14 (2d Cir. 1981); *Franklin Savings Ass'n v. Director, Office of Thrift Supervision*, 934

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[12] The Court ultimately declined to apply the *de facto* officer doctrine in *Glidden* because it involved a challenge to the appointment of the judge, and thus affected the validity of the judgment under review. 370 U.S. at 536. There is no constitutional challenge here to either the structure or the jurisdiction of the district court that entered judgment against NRA.

F.2d 1127, 1150 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992). Even though four of the six *voting* members of the original Commission had been appointed by members of Congress, *Buckley*, 424 U.S. at 113, this Court concluded that "the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date," 424 U.S. at 142. In fact, the Court went even further, finding that uninterrupted enforcement of the federal election campaign finance statutes was important enough to warrant permitting the Commission to continue to act *de facto* for a short period during which Congress could reconstitute the agency. "This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission to function *de facto* in accordance with the substantive provisions of the Act." *Buckley*, 424 U.S. at 143. When Congress reconstituted the Commission after the *Buckley* decision, it effectively incorporated this Court ruling into the legislation.[13]

[13] "All orders, determinations, rules, and opinions made, issued, or granted by the Federal Election Commission before its reconstitution under the amendments made by this Act . . . shall continue in effect to the same extent as if such transfer had not occurred." Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101(g)(3), 90 Stat. 475, 477 (May 11, 1976). The legislation also provided that pending litigation in which the Commission was a party "shall not abate" as a result of the reconstitution of the Commission. *Id.*, sec. 101(g)(5).

There is no legitimate reason why the same result should not obtain here. Initially, the court of appeals' view that the *de facto* officer doctrine should be disregarded whenever necessary to reach a constitutional issue (App. 17a n.6) is contrary to the "deeply rooted" doctrine that courts "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Rescue Army v. Municipal Court*, 331 U.S. 549, 570 n.34 (1947) (quoting *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)). *Accord, e.g., Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).[14] However, the court's felt need to provide some relief in order to justify reaching the constitutional issue can be satisfied without denying the Commission's past actions *de facto* validity. The only constitutional interest of the respondents here is in having the law enforced against them at the behest of an agency whose composition conforms to the Constitution; they have no constitutional right to be relieved of liability for the substantial violations of law the district court found they committed. Thus, the only relief to which they are even arguably entitled is restricting the Commission from proceeding with its law enforcement suit unless and until it is

[14] The court of appeals was clearly wrong in its supposition that if an allegation that the Commission's composition violates the separation-of-powers requirement were not treated as a valid defense to a civil law enforcement suit, this "would foreclose any challenge to the authority of public officers" (App. 17a n.6). Congress included in the Act a special provision for the litigation of such constitutional challenges in declaratory judgment actions, 2 U.S.C. § 437h, and it was pursuant to that provision that this Court invalidated the composition of the original Commission in *Buckley v. Valeo.*

reconstituted in accordance with the Constitution. If a reconstituted Commission determines to proceed with this civil law enforcement suit against the respondents, they would have no remaining constitutional right to avoid entry of judgment against them.[15]

Such a procedure would provide respondents with all the relief necessary to protect their claimed constitutional rights, but would not allow them to escape liability for violating the Act. It would also permit the Commission to continue to administer and enforce the Act in an orderly manner with respect to NRA and other alleged violators, after being reconstituted to satisfy any constitutional requirements, as this Court found appropriate in *Buckley*, 424 U.S. at 142-43.[16]

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[15] "A governmental body 'may effectively ratify what it could theretofore have lawfully authorized.'" *Sullivan v. Carrick*, 888 F.2d 1, 4 (1st Cir. 1989); *see also Bowles v. Wheeler*, 152 F.2d 34, 40 (9th Cir.), *cert. denied*, 326 U.S. 775 (1945) ("[I]t appears settled law that 'the unauthorized bringing of an action may * * * be ratified by the person in whose name and on whose account it was brought so as to sustain the action from the beginning'" (citation omitted)); *Wirtz v. Atlantic States Construction Co.*, 357 F.2d 442, 446 (5th Cir. 1966); *Andrade v. Regnery*, 824 F.2d 1253, 1256 (D.C. Cir. 1987).

[16] Nothing in *Harper v. Virginia Dep't of Transportation*, 113 S. Ct. 2510 (1993), forecloses this limited remedy. *Harper* would require that a finding by this Court that inclusion of the *ex officio* members on the Commission violates the Constitution be applied in all other pending cases in which the issue is not procedurally barred. It would not preclude the Court from also applying the *de facto* officer doctrine to limit the remedy in this case, and then limiting the remedy available to others in similar circumstances in the same way.

"The *de facto* officer doctrine was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently occupying government offices could later be invalidated by exposing defects in the officials' titles." *EEOC v. Sears*, 650 F.2d at 17. Application of the doctrine is particularly appropriate here because, unlike the situation in *Buckley*, *see* p. 22, *supra*, all of the Commisioners that have voted on the Commission's executive actions since 1976 have been *de jure* officers, appointed to office in accord with the Constitution; the only constitutional defect found here was the presence of two additional individuals when the voting Commissioners made their decisions. Such circumstances, which are comparatively peripheral to the exercise of statutory authority by the six voting Commissioners whose appointments unquestionably satisfy the Constitution, should not be permitted to disrupt the orderly enforcement of statutes protecting the integrity of federal elections. Accordingly, even if the Court were to affirm the lower court's constitutional determination, the protection of the public interest in the uninterrupted enforcement of the federal campaign finance laws warrants this Court's review of the court's failure to affirm the *de facto* validity of the Commission's actions in administering these laws up to now.

CONCLUSION

For the reasons stated above, the Federal Election Commission's petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 18, 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 1, 1993 Decided October 22, 1993

No. 91-5360

FEDERAL ELECTION COMMISSION

v.

NRA POLITICAL VICTORY FUND, ET AL.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(90cv0309)

Charles J. Cooper, with whom *Michael A. Carvin*, *Robert J. Cynkar*, and *Elisabeth T. Roth* were on the brief, for appellants.

Richard B. Bader, Associate General Counsel, Federal Election Commission, with whom *Lawrence M. Noble*, General Counsel, and *Marcus C. Migliore*, Attorney, Federal Election Commission, were on the brief, for appellee.

Before: WALD, RUTH B. GINSBURG,* and SILBERMAN, *Circuit Judges*.

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* Former Circuit Judge Ruth B. Ginsburg, now an Associate Justice of the Supreme Court of the United States, was a member of the panel when the case was argued but did not participate in this opinion.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge:* This enforcement action by the Federal Election Commission concerns a transfer of $415,744.72 from the National Rifle Association Institute for Legislative Action (NRA-ILA) to its political action committee, the NRA Political Victory Fund (PVF). The district court held that the transfer was a "contribution" prohibited by the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431 *et seq.* (1988), and rejected appellants' various constitutional arguments based on the First Amendment and separation of powers.

We believe that the Commission lacks authority to bring this enforcement action because its composition violates the Constitution's separation of powers. Congress exceeded its legislative authority when it placed its agents, the Secretary of the Senate and the Clerk of the House of Representatives, on the independent Commission as non-voting *ex officio* members. We therefore reverse.

I.

In March and July of 1988, PVF sent a letter to all NRA members soliciting funds to finance its activities in the upcoming November elections. The cost of the two mailings totalled $415,744.72. NRA-ILA paid the vendors the full amount on behalf of PVF. On August 1, 1988, PVF reimbursed NRA-ILA for these payments, an action it soon regretted because of a shortfall in PVF's operating budget. Accordingly, on October 20, 1988, NRA-ILA wrote a check to PVF to return the reimbursement. In the final

weeks before the fall elections, PVF used its funds, which included the $415,744.72, to make independent expenditures (such as television or print advertisements) on behalf of candidates and to contribute directly to political campaigns.

The Commission does not challenge the propriety of the first two transactions. NRA-ILA's initial payments to vendors fall within section 441b(2)(2)(C), which permits a corporation to pay for the expenses of its political action committee in connection with direct solicitation of members. 2 U.S.C. § 441b(b)(2)(C) (1988). PVF's reimbursement to NRA-ILA is lawful because FECA does not restrict the flow of money from a political action committee to its parent corporation.

The Commission, however, notified appellants in October 1989 that it had reason to believe that the third transaction violated 2 U.S.C. § 441b(a) (1988), which prohibits corporate contributions and expenditures in connection with federal elections. Appellants disagreed and argued that the Commission had improperly considered the third transfer as if it were isolated from the two prior transactions. When statutorily mandated negotiations failed in late 1990, the Commission brought this civil enforcement action, *see* 2 U.S.C. § 437g(a)(6)(A) (1988), against NRA-ILA for making the illegal contribution, PVF for accepting it, and Grant A. Wills for facilitating it as Treasurer of PVF. *See* 2 U.S.C. § 441b(a) (1988).

Both sides moved for summary judgment. Appellants argued that the transaction did not violate section 441b(a), that the Commission lacked authority to act against them because certain features of

the operation and composition of the Commission violate separation of powers principles, and that the transaction was protected by the First Amendment under the Supreme Court's decision in *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

The district court determined that the October 20, 1988, transfer was a "contribution" in violation of section 441b(a). The court held that appellants' separation of powers arguments were non-justiciable and rejected their First Amendment claims. The court imposed a civil penalty equal to the Commission's cost of investigating and prosecuting the action, and enjoined appellants from similar transfers in the future. *See Federal Election Comm'n v. NRA Political Victory Fund*, 778 F. Supp. 62 (D.D.C. 1991). Appellants essentially repeat their arguments on appeal, contending that the district court erred in deciding each of their claims.

II.

Because we hold that the composition of the Commission violates separation of powers, we do not pass on appellants' arguments based on the First Amendment as well as those turning on statutory interpretation. Although courts should " 'refrain from passing on the constitutionality of an act of Congress unless obliged to do so,' " *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919)), we note that in this unusual circumstance we need not find a violation of section 441b before addressing the separation of powers claim. The Supreme Court in similar situations—

when plaintiffs challenged the constitutional composition or character of a tribunal—determined the constitutional status issue without reaching the merits.[1] *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 859 (1986) (upholding constitutionality of CFTC's authority to adjudicate common law counterclaims without passing on the merits of the counterclaim); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56, 87 (1982) (holding that the bankruptcy courts' jurisdiction to adjudicate common law claims violated Article III without deciding the claims).[2]

Appellants claim that the composition of the Commission, particularly its two *ex officio* members, violates the Constitution's separation of powers. In 1974, Congress amended FECA to create the Commission and charged it with administering the Act. The Commission then, as now, had eight members; the Secretary of the Senate and the Clerk of the House of Representatives (non-voting and *ex officio*), and six voting members whom Congress played varying roles in appointing. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held, *inter alia*, that the limitations Congress placed on the President's power to nominate voting members of the Commission violated the Appointments Clause. Although the Court mentioned the *ex officio* members,

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[1] In any event, the statutory issue is intertwined with the First Amendment concerns.

[2] We note, however, that the Court did not explicitly address whether it ought to decide the constitutional question before addressing the merits of the underlying common law claims in these cases.

see id. at 113, it never discussed the constitutionality of their status.

After *Buckley*, Congress reconstituted the Commission as follows:

> The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

2 U.S.C. § 437c(a)(1) (1988).

It is argued that the reconstituted Commission still violates separation of powers principles in several respects. First, appellants urge that FECA's requirement that "[n]o more than 3 members of the Commission . . . may be affiliated with the same political party," 2 U.S.C. § 437c(a)(1) (1988), impermissibly limits the President's nomination power under the Appointments Clause. Second, appellants maintain that the President does not exercise sufficient control over the Commission's civil enforcement authority, a core executive function, to satisfy the constitutional mandate that he "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. And finally, they assert that Congress exceeded its Article I authority by placing the Secretary and the Clerk on the Commission as *ex officio* members.

The Commission claims that appellants lack standing to raise the separation of powers claims. As has

so often been said, standing requires a showing of (1) an injury in fact that is (2) fairly traceable to allegedly unlawful government action and (3) redressable by the requested relief. *See Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2306 (1991) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). This case does not raise the first and last of these requirements; civil sanctions are injuries in fact, and vacating the order imposing the sanctions redresses the injuries. The district court held, however, that appellants' injury is not "fairly traceable" to (caused by) the alleged constitutional defects of the Commission because appellants did not allege that the outcome of the Commission's decisionmaking process would have been different if it were composed differently.

We think the district court's conclusion was erroneous at least with respect to appellants' last two separation of powers arguments—that the independence of the Commission frustrates the President's executive power and that the *ex officio* members unconstitutionally serve on the Commission. A litigant "is not required to show that he has received less favorable treatment than he would have if the agency were lawfully constituted and otherwise authorized to discharge its functions." *Committee for Monetary Reform v. Board of Governors of Fed. Reserve Sys.*, 766 F.2d 538, 543 (D.C. Cir. 1985) (citation omitted); *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 533 (1962) ("The claim advanced by the petitioners, that they were denied the protection of [Article III] judges . . . has nothing to do with the manner in which either of these judges conducted

himself in these proceedings. . . ."); *Andrade v. Lauer*, 729 F.2d 1475, 1496 (D.C. Cir. 1984) (noting that litigants could "rarely or never" show that "if the government had operated in accord with [the Constitution], it would not have taken adverse action against them"). Instead, litigants need only demonstrate that they have been "directly subject to the authority of the agency." *Committee for Monetary Reform*, 766 F.2d at 543. Thus, in *Committee for Monetary Reform*, we denied standing to the plaintiff-appellants, private businesses and individuals who alleged that agency policy caused injurious monetary instability and high interest rates, because the agency "in no way exercise[s] direct governmental authority over the appellants." *Id.* at 544. Because an enforcement action is the paradigm of "direct governmental authority," appellants have standing to raise their arguments based on the Take Care Clause and Article I.

We agree with the district court, although using a different analysis, that appellants' challenge to the alleged restriction on the President's appointment power to select more than three commissioners from one party is not justiciable. Congressional limitations—even the placement of burdens—on the President's appointment power may raise serious constitutional questions. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466-67 (1989). But it is impossible to determine in this case whether the *statute* actually limited the President's appointment power. Appellants do not argue, nor can we assume, that the President wished to appoint more than three members of one party and was restrained by FECA from doing so. Presidents have often

viewed restrictions on their appointment power not to be legally binding. *See, e.g., Statement on Signing the Cranston-Gonzales National Affordable Housing Act*, 26 WEEKLY COMP. PRES. DOC. 1930, 1931 (Nov. 28, 1990) (Congressional limitations "do not constrain the President's constitutional authority to appoint officers of the United States."); *Statement on Signing the National and Community Service Act of 1990*, 26 WEEKLY COMP. PRES. DOC. 1833, 1834 (Nov. 16, 1990); *Statement on Signing the Intelligence Authorization Act*, Fiscal Year 1990, 25 WEEKLY COMP. PRES. DOC. 1851, 1852 (Nov. 30, 1991). Of course, such legislation may impose political restraints. Particularly with respect to the Commission—for which, because of the sensitive political nature of its work, an equal number of members from each party was contemplated, *see Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1982) (noting that the Commission is "inherently bipartisan" and that "it must decide issues charged with dynamics of party politics"); H.R. REP. NO. 917, 94th Cong., 2d Sess. 3 (1976) ("It is therefore essential in this sensitive area [of campaign regulation] that the system of administration and enforcement enacted into law does not provide room for partisan misuse . . . .")—it is hard to imagine that the President would wish to alter that balance, even if the understanding had not been reflected in the statutory language. More important, as appellants recognize, under its Advice and Consent authority the Senate may reject or approve the President's nominees for whatever reason it deems proper. Since all commissioners must be confirmed by the Senate, it would seem that a Senate resolution or even an informal communication to the

President would have the same effect as the statute. It is not the law, therefore, which arguably restrains the President, but his perception of the present Senate's view as it may be assumed to be reflected in the statute.

Superficially, appellants' claim here may appear to be analogous to its other challenges to the Commission's authority, concerning which we hold that they need not show that the Commission would have acted differently if it were constitutionally composed. *See supra* at 6-7. But these questions—whether the Commission is independent of the President because he cannot remove the commissioners and whether the *ex officio* members are present during the Commission's deliberations—have some impact (even though the extent of which may be impossible to measure) on how the Commission decides matters before it. *See Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986) ("'[I]t is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems.'") (quoting *Synar v. United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986)); *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2312 (1991) (holding unconstitutional a board of review comprised of members of Congress with veto power over certain executive functions, even though the statutory scheme "might prove to be innocuous"). We cannot assume, however, that the bipartisanship requirement has any effect on the Commission's work, for without the statute the President could have appointed exactly the same members. For appellants to

prevail we would have to conclude that *all* the Commission's appointments were invalid because infected by the statute. Appellants do not allege that FECA affected the President's choice with respect to any particular nomination to the Commission, so the constitutional status of all six commissioners is indistinguishable. If FECA is to be thought to have tainted any nomination, it tainted all.[3] Accordingly, in order to redress appellants' alleged injuries in this case, we must assume, without any factual support, that each of the commissioners would not have been appointed but for the statute. That we cannot do. It may well be that only if the President appoints and the Senate confirms a fourth same-party member to the Commission could the unconstitutionality of the bipartisanship requirement be regarded as justiciable, when the government raises it as a defense to the charge that the member's participation violates FECA.[4]

Although appellants have standing to assert that the Commission acts unconstitutionally because of its independence of the President in its law enforcement activities, there is not much vitality to the claim after *Morrison v. Olson*, 487 U.S. 654 (1988). *Morrison*, which held constitutional the independent counsel authorized by the Ethics in Government Act, approved a much greater diminution of presidential authority than presented in this case. The Commission is patterned on the classic independent regulatory agency sanctioned long before *Morrison* in

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[3] We could hardly hold only the appointments of commissioners appointed by a President of the opposite party invalid.

[4] Perhaps the President could challenge the constitutionality of the law by alleging that the statute impinged on his appointment power with respect to a particular nomination.

Humphrey's Executor v. United States, 295 U.S. 602 (1935). Although *Morrison* reconsidered the rationale of *Humphrey's Executor*, *see Morrison*, 487 U.S. at 689-90, it was certainly not for the purpose of expanding presidential power; the independent counsel, after all, exercised power previously possessed by the Justice Department, power that had been thought to be a traditional executive function. *See United States v. Nixon*, 418 U.S. 683, 693 (1974); *INS v. Chadha*, 462 U.S. 919, 1002 (1983) (White, J., dissenting); *Committee for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986). Appellants would distinguish *Morrison* on the grounds that the Act explicitly empowered the Attorney General (hence the President) to remove an independent counsel for "good cause." Here the statute is silent as to the President's removal authority, and therefore appellants argue that he has none. However, statutory silence could imply that the President actually enjoys an unrestricted power of removal. *See Shurtleff v. United States*, 189 U.S. 311, 316 (1903). The Commission suggests that the President can remove the commissioners only for good cause, which limitation is implied by the Commission's structure and mission as well as the commissioners' terms. We think the Commission is likely correct, but, in any event, we can safely assume that the President would at minimum have authority to discharge a commissioner for good cause—if for no other. *See SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988) (recognizing the President's authority to remove SEC members for good cause despite governing statute's silence).

* * * *

We turn now to appellants' more substantial claim. It is undisputed that both *ex officio* members are appointed by and are agents of Congress, and it is also settled that Congress may not appoint the voting members of this Commission or, indeed, any agency with executive powers. *See Bowsher v. Synar*, 478 U.S. 714, 732-33 (1986); *Buckley v. Valeo*, 424 U.S. 1, 139-141 (1976). There remains only the question whether *ex officio* non-voting members enjoy a different status for purposes of constitutional analysis.

The Commission would have us conclude that the *ex officio* members are constitutionally harmless. Non-voting members cannot serve as chairman, cannot call or adjourn a meeting, and are not counted in determining a quorum. In short, we are told that the *ex officio* members have no *actual* influence on agency decisionmaking. If that were so, congressional intent as reflected in the legislative history would seem frustrated. At least certain members of Congress clearly intended that the appointed officers serve its interests while serving as commissioners. *See* 122 CONG. REC. 6706 (1976) (statement of Senator Mansfield) (agreeing that "as an ex officio member, [the Secretary] would not just remain mute, that he could give advice and consent, that he could, in effect, represent the Senate's point of view"); *id.* (statement of Senator Cannon) (agreeing with Senator Mansfield with respect to campaign finance matters "as related to the Senate").

Legislative history aside, we cannot conceive why Congress would wish or expect its officials to serve as *ex officio* members if not to exercise *some* influence. Even if the *ex officio* members were to remain

completely silent during all deliberations (a rather unlikely scenario), their mere presence as agents of Congress conveys a tacit message to the other commissioners. The message may well be an entirely appropriate one—but it nevertheless has the potential to influence the other commissioners. Federal law recognizes in other contexts that non-voting participation can influence a decisionmaking process. For example, FED. R. CRIM. P. 24(c) states: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." An alternate juror, of course, does not have a right to vote. The rationale animating this rule is that "[w]hen alternate jurors are present during the deliberations, the possible prejudice is that defendants are being tried not by a jury of 12, as is their right, but by a larger group." *United States v. Jones*, 763 F.2d 518, 523 (2d Cir.), *cert. denied*, 474 U.S. 981 (1985) (citations omitted).

In *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298 (1991) ("*MWAA*"), the Supreme Court held unconstitutional a board of review composed entirely of members of Congress that had veto power over the decisions of regional airports authority. In so doing, the Court recognized that the "unique" arrangement "might prove innocuous." *Id.* at 2312. The Court invalidated the law, however, because "the statutory scheme challenged today provides a blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role." *Id.* The Court recalled that the Framers recognized that "power is of an encroaching nature," THE FEDERALIST No. 48, at 332 (J. Madison) (J. Cooke ed. 1961),

and therefore the Constitution imposes a structural ban on legislative intrusions into other governmental functions. *See MWAA*, 111 S. Ct. at 2310. It is true that the Court has not considered the circumstances of this case; the members of Congress in *MWAA* and the Comptroller General in *Bowsher v. Synar*, 478 U.S. 714 (1986), possessed explicit voting or decisionmaking power that is not present here. However, since "the legislature 'can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments,'" *id.* at 2310-11 (quoting THE FEDERALIST No. 48, at 334), the mere presence of agents of Congress on an entity with executive powers offends the Constitution.

To be sure, as the Court has said often, the Constitution does not require a "hermetic sealing off of the three branches of Government." *Buckley*, 424 U.S. at 121. The Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), and it 'anticipates that the coordinate Branches will converse with each other on matters of vital common interest." *Mistretta v. United States*, 488 U.S. 361, 408 (1989). The Commission argues that Congress intended *ex officio* membership to fulfill this coordinating function by having the Secretary and the Clerk play a mere "informational or advisory role" in agency decisionmaking. Advice, however, surely implies influence, and Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role. *MWAA*, 111 S. Ct. at 2311-12. In that capacity, Congress

enjoys ample channels to advise, coordinate, and even directly influence an executive agency. It can do so through oversight hearings, appropriation and authorization legislation, or direct communication with the Commission.[5] What the Constitution prohibits Congress from doing, and what Congress does in this case, is to place its agents "beyond the legislative sphere" by naming them to membership on an entity with executive powers.

III.

There remains the question of remedy. We need not concern ourselves with the effect of our opinion on the whole statute because FECA contains an explicit severability clause. *See* 2 U.S.C. § 454 ("If any provision of this Act . . . is held invalid, the validity of the remainder of the Act . . . shall not be affected thereby."). That clause raises a presumption that Congress would wish the offending portion of the statute—creating the *ex officio* members of the Commission—to be severed from the rest. And the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 108-09, 140 (1976), relying on that presumption, invalidated and severed a much greater portion of the statute—including, of course, the composition of the Commission. Indeed, Congress is not even required after our decision, as it was after *Buckley*, to amend the statute. Since what remains of FECA is not "unworkable and inequitable," *id.* at 252 (Burger,

[5] *But see Pillsbury Co. v. FTC*, 354 F.2d 952, 964-65 (5th Cir. 1966) (holding that Senate subcommittee proceedings where commissioners were questioned about their conduct in a specific case deprived the defendant corporation of due process).

C.J., concurring in part and dissenting in part), the unconstitutional *ex officio* membership provision can be severed from the rest of FECA.

The Commission asserts that, regardless of the constitutionality of the *ex officio* membership provision, we should not provide a remedy to appellants because under the *de facto* officer doctrine the enforcement actions of the Commission cannot be challenged.[6] Under that doctrine " 'where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.' " *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (plurality opinion of Harlan, J.) (quoting *McDowell v. United States*, 159 U.S. 596, 602 (1895)). The Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) relied on this theory (although without explicitly citing to the *de facto* officer doctrine) to validate the Commission's past actions. But the relief sought by the plaintiffs there, declaratory and injunctive remedies, *see id.* at 9, could have purely prospective impact. Here, by contrast, appellants raise the constitutional challenge as a defense to an

[6] The Commission actually raises the *de facto* officer doctrine as an argument against justiciability, asserting that our inability to grant relief renders a decision purely advisory. This circular argument would foreclose any challenge to the authority of public officers, an effect that the *de facto* officer doctrine does not sanction. *See Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984) ("[T]he court should avoid an interpretation of the de facto officer doctrine that would likely make it impossible for these plaintiffs to bring their assumedly substantial constitutional claim and would render legal norms concerning appointment and eligibility to hold office unenforceable.").

enforcement action, and we are aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case. The Supreme Court in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 88 (1982), declared an aspect of the bankruptcy law unconstitutional and stated that its opinion would act prospectively. Still, the party who challenged the constitutionality of the statute was afforded relief. *See id.* at 87 n.40. And the Court relied exclusively on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), to limit the retroactive effect of its decision. *Chevron Oil* was recently rejected by the Court in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993).

* * * *

For the foregoing reasons, the judgment of the district court is hereby reversed.

So Ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-3090
(Stanley Sporkin)

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

NRA POLITICAL VICTORY FUND, *et al.*, DEFENDANT.

MEMORANDUM OPINION

[Filed Nov. 15, 1991]

The plaintiff filed this suit on December 20, 1990 seeking a declaration that defendants had violated the federal campaign finance laws and an assessment of civil penalties against the defendants. Defendants answered and denied that there had been any violation. Cross motions for summary judgment were filed several months later, and oral argument was heard on September 20, 1991. No genuine issue of material fact remains in dispute, therefore this case is appropriate for summary judgment.

I. *The Disputed Transaction*

There are three defendants in this suit: the National Rifle Association—Institute for Legislative Action, the NRA Political Victory Fund, and Grant

Wills, Treasurer of the NRA Political Victory Fund. The National Rifle Association—Institute for Legislative Action (hereinafter "ILA") is a component of one overall organization, the National Rifle Association. The ILA is not separately incorporated from the NRA but it does have its own separate bank accounts and its own fund-raising system. The NRA Political Victory Fund (hereinafter "PVF") is a separate corporate entity. It is a segregated fund, meeting the qualifications of 2 U.S.C. § 441(b)(2)(C).

The Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-455, prohibits corporations from contributing to campaigns or making campaign-related expenditures. *See* 2 U.S.C. § 441b(a). This prohibition encompasses contributions made by a corporation to a segregated fund established for the purpose of supporting political campaigns. However, corporations are allowed to pay for the costs of soliciting contributions to a segregated fund either by paying directly or by later reimbursing the fund. 2 U.S.C. § 441b(b)(2)(C); 11 C.F.R. § 114.5(b). If the segregated fund pays the solicitation expenses initially and is later reimbursed by the corporation, reimbursement must occur "no later than thirty calendar days after the expense was paid by the separate segregated fund." 11 C.F.R. § 114.5(b)(3).

The transaction which gave rise to the dispute in this case went as follows. The ILA dispatched two mailings to raise money for the PVF, one in March of 1988 and one in July of 1988. The ILA spent a total of $415,744.72 on these mailings. This payment was entirely legal since corporations may pay for the solicitation expenses of the segregated fund. Then on August 1, 1988, the PVF reimbursed the ILA for its

expenditures, remitting to it exactly $415,744.72. This payment was also legally permissible since a segregated fund can pay for its own solicitation expenses. Then on October 20, 1988, the ILA gave the exact same amount, $415,744.72, back to the PVF. The October 20 payment is the object of the controversy in this case.

The defendants claim that the October 20 payment was a legally permissible reimbursement of solicitation expenses to the PVF. The FEC disagrees and claims that the October 20 payment is not a reimbursement but a direct corporate contribution. The FEC argues that the payment cannot qualify as a permissible reimbursement because it was made 81 days after the PVF outlay which it was supposedly reimbursing.

The defendants also argue that if the October 20 payment is deemed a contribution, it was nonetheless legally permissible under the rule of *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (hereinafter "*MCFL*"). In *MCFL* the Supreme Court held that it was an unconstitutional restriction on First Amendment rights to prohibit a nonprofit organiaztion that received no contributions from corporations or labor unions from producing a pre-election newsletter that flagged candidates' views on abortion. The Court noted that restrictions on corporate independent expenditures were intended to prevent the wealth amassed for business purposes in corporate treasuries from being spent contrary to shareholder interests or being used to unduly influence elections. In the Court's view, that risk did not arise in the particular arrangement MCFL had.

The FEC rejects the application of the *MCFL* decision to the ILA, claiming that the holding of *MCFL* is limited to a small class of independent expenditures and does not apply to the contribution made in this case.

The Court will now proceed to address these arguments.

II. *The Violation*

To begin, the Court finds that the October 20 payment from the ILA to the PVF violated the FECA. First of all, it does not qualify as a reimbursement for solicitation expenses. Although defendants claim that they simply changed their minds and for fiscal reasons wanted to have the ILA bear the cost of the solicitation as it originally had,[1] the motivation for making the payment does not render it lawful. There must be a time at which a transaction is closed. Defendants cannot be allowed to keep their books open forever so that they can transfer funds between the two entities at will. The FEC has promulgated regulations through the appropriate notice and comment rulemaking procedure which set a 30-day time limit on reimbursements for solicitation expenses. *See* 11 C.F.R. § 114.5(b)(3). The regulations provide a reasonable window of time for transferring funds in the event that there has been an accounting error or that the decision is made to shift the burden of solicitation expenses. There is no legal basis for ignoring

[1] Defendants state that some time after August 1 they realized that the PVF needed more funds than they had projected at the time the PVF reimbursed the ILA for the solicitation expenses. Hence, they caused the October 20 payment to be made. *See* Wills Affidavit, ¶ 28.

or overturning this regulation. Hence, as a matter of law, the October 20 payment to the PVF from the ILA cannot qualify as a reimbursement for solicitation expenses under 2 U.S.C. § 441b(b)(2)(C).

Moving now to defendants' second argument, the Court finds that the October 20 payment was a contribution and was not of the kind permitted under *MCFL*. *MCFL* permits some nonprofit corporations to make independent expenditures in connection with federal election campaigns where there is no risk that sizeable corporate treasuries will be used to unduly influence elections. Massachusetts Citizens for Life had a policy of not accepting contributions from business corporations or labor unions. Defendants here say in their pleadings that although the amounts are small, the ILA does receive corporate contributions. Nowhere do defendants state a policy equivalent to that of MCFL. Hence the defendants do not fit in the group of organizations affected by the *MCFL* holding, a group which the Court acknowledged at the time of its decision would be "small." 479 U.S. at 264.

Much as defendants struggle to characterize the October 20 payment as actually paying for solicitation material purchased in March and July, that's not where the money went. The ILA made a contribution to the PVF intended to bolster the PVF's accounts for its campaign-related activities in support of particular candidates. By defendants' own account at argument, the October 20 payment returned money to PVF originally taken from PVF to correct for inaccurate financial projections so that PVF would have an adequate budget to pay for its substantive campaign-related activities. The money

used to pay for the solicitation materials was paid by ILA back in March and July, 1988.

The Court finds that the October 20 payment was not a reimbursement of solicitation expenses and was instead an illegal contribution in violation of the FECA.

III. *The Constitutional Status of the FEC*

In their motion for summary judgment, defendants have also made the argument that the Federal Election Commission is unconstitutional. They claim the statutory scheme for appointing Commissioners infringes on the presidential appointment power granted in the Constitution because the President is prevented from appointing more than three Commissioners from the same political party. They further claim that because the Commissioners cannot be controlled or removed by the President, execution of the laws is being entrusted to someone other than the President, who under Article II is to have the sole executive power. Finally, they claim there is a violation of separation of powers because the Secretary of the Senate and the Clerk of the House sit on the Federal Election Commission as non-voting *ex officio* members.

Defendants have read the Constitution correctly. Article II gives the President alone the power to appoint officers of the United States and the power to execute the laws. It follows, therefore, that it is the President and not the NRA who can challenge alleged infringements of presidential powers because only the President's interests are affected. Plaintiffs bringing suit must, at a minimum, allege facts that show a personal stake in the outcome of the question

posed. *See Warth v. Seldin*, 422 U.S. 496, 499 (1975) ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally.") Moreover, the Court also said that a plaintiff "cannot rest his claim to relief on the legal rights or interests of third parties." 422 U.S. at 499. *See also Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (No standing to raise claim where relief sought by plaintiff is too attenuated from basis of claim).

The same principles apply to the defendants in this case. Any attempt to show that defendants' interests have been harmed by the statutory appointment scheme for the FEC would be speculative at best.[2]

[2] The Court notes that many so-called "independent agencies" operate under a scheme very similar to that governing the FEC. These agencies, including the Securities and Exchange Commission, the Interstate Commerce Commission, and the Federal Trade Commission, are sometimes called the "fourth branch of government." They have functioned admirably for decades. Indeed the Interstate Commerce Commission is over 100 years old, the FTC 75, and the SEC over 50. *See generally*, B. Schwartz, *Administrative Law* 7-11 (1988). There must be a presumption of regularity where organizations have performed their missions for many years.

Other courts have rejected arguments like the one set forth by defendants. For example, the Ninth Circuit not long ago upheld the constitutionality of the Federal Trade Commission. *See FTC v. American National Cellular Inc.*, 810 F.2d 1511 (9th Cir. 1987). The Court stated in its opinion that officers of the United States who are appointed by the President but only removable by impeachment may enforce federal law. *Id.* at 1514.

Similarly, in *Mistretta v. United States*, 109 S.Ct. 647 (1989), the Supreme Court upheld the statutory scheme

And ultimately, defendants have raised an issue that bears on the rights of a third party, namely the President, and not on their own legal interests. Similarly, any claim that the presence of non-voting *ex officio* members of the FEC has harmed defendants' interests is equally speculative. There has been no allegation that either the Secretary of the Senate or the Clerk of the House influenced the outcome of FEC decisionmaking.

Indeed, defendants have not alleged that the Secretary and the Clerk were even present for or participated in the proceedings in question. They serve as non-voting members and as such have no real say in the outcome of any Commission proceedings. To declare the FEC unconstitutional because the statute allows certain individuals to sit as nonvoting members of the Commission would be an excessive remedy for what is only an alleged and insubstantial infringement. At best, if defendants are correct in their assessment of the Constitution, the appropriate remedy for the problem would be to bar the Secretary and the Clerk from attending Commission meetings. Since there has been no showing that these nonvoting members had any involvement in the decisions made in connection with this action, there is no need for

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creating the Sentencing Commission. Under that statute, the President is even further restricted in his appointment authority: he must appoint at least three federal judges to the Commission, and he must first consider a list of judges recommended by the Judicial Conference. As there are far fewer federal judges than there are members of any political party in this country, this requirement places a far tighter constraint on the presidential appointment power than the party restrictions that apply to the Federal Election Commission.

the Court to concern itself with this separation of powers argument.

IV. *Assessment of Penalties and Injunctive Relief*

Although the parties in this case have requested further oral argument on the issue of penalties, the Court believes that it has all the relevant information it needs to decide this issue. Plaintiffs are seeking one penalty from the PVF and Grant Wills and one from the ILA, each in the amout of the October 20 payment that constituted the violation. That amount is $415,744.72. The statute, 2 U.S.C. § 437(g)(a)(6)(A), allows the Court to assess a penalty no greater than the amount implicated in the violation, but it does not require that the Court select any particular amount.

To anyone reviewing the October 20 payment, it was obvious that the October 20 payment was not legally permissible. The defendants constructed a legal argument in an attempt to defend their actions, but that argument elevates form far above substance and holds no weight with this Court. Defendants could have achieved the end result of all these transactions in a legally permissible manner had they used better financial planning and realized that the PVF would ultimately need the money. Therefore, the Court does not find that defendants have engaged in the kind of impermissible conduct that would require the assessment of a penalty for the full $415,744.72. Such a penalty would simply not be proportional to the violative conduct. Moreover, the record does not indicate that the defendants are chronic violators of the campaign finance laws who need stiff punishment.

Nonetheless, the fact remains that the money was spent on campaign-related expenditures in violation of FECA. In recognition of that fact, the Court will assess a penalty against the defendants that will reflect the nature and the effect of the violation as well as the effort expended by the Commission and its staff in enforcing the federal election laws.

Accordingly, the Court will assess a penalty measured by the costs incurred by the FEC in investigating and prosecuting this action. Defendants shall pay the ordinary costs associated with litigation as well as the full amount of attorney's fees and other personnel expenses allocable to this action. Plaintiffs shall have fifteen days to provide the Court with an accounting of the costs involved.

Finally, plaintiffs seek an injunction that prohibits defendants from repeating the violation. Defendants maintained the position in open court that they had not violated the federal election laws, and they refused to promise that they would not repeat the transaction implicated here because they wished to maintain flexibility in their bookkeeping. Based on this representation, the Court finds that an injuction is appropriate because it is possible the violation will be repeated. As the Court noted at the hearing, if defendants maintain close scrutiny over their accounts, there should be no need to repeat the violation.

An appropriate order accompanies this opinion.

DATE: 11/15/91

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-3090
(Stanley Sporkin)

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

NRA POLITICAL VICTORY FUND, ET AL., DEFENDANT.

ORDER

[Filed Nov. 15, 1991]

For the reasons stated in the aforegoing opinion, it is this 15 day of November, 1991, hereby

DECLARED that defendants violated section 441b of the Federal Election Campaign Act when on October 20, 1988 the National Rifle Association—Institute for Legislative Action paid $415,744.72 to the NRA Political Victory Fund; and it is

ORDERED that defendants, their officers, agents, servants, employees, attorneys, and those persons in active concert or participating with them in their activities, shall not make or receive payments made by a corporation to a segregated fund to reimburse said fund for solicitation expenses, unless such payments are made in accordance with each and every requirement of 11 C.F.R. § 114.5(b)(3), i.e. such payments are made no later than thirty days after

the segregated fund makes the initial expenditure for solicitation; and it is further

ORDERED that defendants shall pay a civil penalty measured by the amount of the total costs incurred by the Federal Election Commission in investigating and prosecuting this action. The plaintiff shall have fifteen days to submit to the Court, upon notice to the plaintiff, a full accounting of all such costs, including attorneys' fees, fees for other personnel, and other associated costs.

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-3090
(Stanley Sporkin)

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

NATIONAL RIFLE ASSOCIATION, ET AL, DEFENDANTS.

MEMORANDUM OPINION

[Filed Dec. 11, 1991]

Plaintiffs originally brought this suit to obtain a declaratory judgment stating that defendants had violated the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-455, when on October 20, 1988, the National Rifle Association—Institute for Legislative Action reversed an earlier transaction and transferred the same $415,744.72 back to the NRA Political Victory Fund. Plaintiffs claimed that this payment could not qualify as a legally permissible reimbursement for solicitation expenses because it was made too long after those expenses were incurred; rather, plaintiffs alleged the payment was an impermissible corporate contribution to a political committee. The Court heard argument on cross motions for summary judgment and granted summary judgment in favor of plaintiff, holding that the payment was indeed made in violation of the FECA.

Plaintiff also asked the Court to assess civil penalties against the defendants. The Court indicated that it would assess penalties, and asked plaintiff to submit the amount it expended in investigating and prosecuting this case to be used as a measure for determining the amount of the civil penalty.

Instead of providing the information requested, the plaintiff has now filed a Motion for Amendment or Clarification of the Court's Order. The plaintiff claims that using such information as a measure for assessing a civil penalty against defendants would thwart the purpose of the statute, i.e. deterrence. The plaintiff also asserts that it would be administratively burdensome for it to account for its costs and expenses.

The statute permits the Court to assess a penalty up to the amount involved in the violation which in this case is $415,744.72. *See* 2 U.S.C. § 437(g)(a)(6)(B). The Court believes the amount of U.S. government funds expended to investigate and prosecute defendants' conduct would provide information that would be relevant for purposes of measuring the amount to be assessed. In *Federal Election Commission v. Furgatch*, 869 F.2d 1256 (9th Cir. 1989), the Court of Appeals for the Ninth Circuit enumerated four factors to consider when determining the size of a penalty under the FECA. Those are:

> (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; and (4) the necessity of vindicating the authority of the responsible federal agency. (citation omitted)

Id. at 1258. The plaintiff points to these factors as a means for guiding this Court's determination. It

does not explain how the factors can be translated into numbers.

Contrary to plaintiff's view, the Court believes that it did take into account the relevant factors in its consideration of an appropriate civil penalty. By asking plaintiff to submit an accounting of costs and expenditures, all the Court was seeking was to determine what penalty, within the statutory range, would be adequate to produce an appropriate assessment. It is obvious that the FEC is either unwilling or unable to provide the information requested.

Under the circumstances, I will set a civil penalty of $40,000, representing approximately 10% of the amount involved in the violation. This takes into account the dual factors that while the NRA defendants acted deliberately to circumvent prescribed reimbursement and contribution requirements, the NRA defendants could have accomplished these objectives legitimately had they used proper fiscal planning.

Because of the deliberate nature of defendants' actions, the Court must impose a substantial penalty in order to deter them from repeating this violation. Despite defendants clear violation of FEC requirements, they continue to insist that they were in full compliance with all applicable requirements. To accept the NRA defendants' position would make a mockery of the campaign finance laws and would permit participants in campaign financing to avoid ever making a final accounting of their transactions. The NRA defendants must realize that their conduct cannot be repeated.

Accordingly, the Court will assess a civil penalty against the defendants in the amount of $40,000. The

Court hopes that by having defendants pay this amount, which the defendants undoubtedly worked hard to raise, the seriousness of the offense will be impressed upon them.

DATE: 12/10/91

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-3090
(Stanley Sporkin)

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

NATIONAL RIFLE ASSOCIATION, ET AL, DEFENDANTS.

ORDER

[Filed Dec. 11, 1991]

For the reasons given in the aforegoing memorandum opinion, it is this 10 day of December, 1991, hereby

ORDERED that defendants shall collectively pay a civil penalty in the amount of $40,000.

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Court

APPENDIX C

BEFORE THE
FEDERAL ELECTION COMMISSION

RAD Referral 89L-28

IN THE MATTER OF

NRA POLITICAL VICTORY FUND and
GRANT A. WILLS, as treasurer
NATIONAL RIFLE ASSOCIATION-INSTITUTE
FOR LEGISLATIVE ACTION

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session of October 17, 1989, do hereby certify that the Commission decided by a vote of 4-1 to take the following actions with respect to RAD Referral 89L-28:

1. Open a Matter Under Review (MUR).
2. Find reason to believe that the NRA Political Victory Fund and Grant A. Wills, as treasurer, violated 2 U.S.C. § 441b(a).
3. Find reason to believe that the National Rifle Association-Institute for Legislative Action violated 2 U.S.C. § 441b(a).

Commissioners Aikens, Josefiak, McDonald, and Thomas voted affirmatively for the decision; Commissioner Elliott dissented; Commissioner McGarry was not present at the time of the vote.

Attest:

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

Date: 10/18/89

APPENDIX D

BEFORE THE
FEDERAL ELECTION COMMISSION

MUR 2991

IN THE MATTER OF

NRA POLITICAL VICTORY FUND and
GRANT A. WILLS, as treasurer

NATIONAL RIFLE ASSOCIATION-INSTITUTE
FOR LEGISLATIVE ACTION

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on April 24, 1990, do hereby certify that the Commission decided by a vote of 4-1 to take the following actions in MUR 2991:

1. Find probable cause to believe that the NRA Political Victory Fund and Grant A. Wills, as treasurer, violated 2 U.S.C. § 441b(a).
2. Find probable cause to believe that the National Rifle Association-Instittue for Legislative Action violated 2 U.S.C. § 441b(a).
3. Approve the conciliation agreement attached to the General Counsel's report dated April 11, 1990, subject to the following changes:

a) Correction of line seven in paragraph one on page one to state, probable cause to believe, in lieu of, reason to believe.

b) Amendment on page three to provide for a civil penalty of Ten Thousand Dollars ($10,000.00).

4. Approve the letter attached to the General Counsel's report dated April 11, 1990.

Commissioners Elliott, Josefiak, McGarry, and Thomas voted affirmatively for the decision; Commissioner Aikens dissented; Commissioner McDonald was not present.

Attest:

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

4-26-90
Date

APPENDIX E

BEFORE THE
FELERAL ELECTION COMMISSION

MUR 2991

IN THE MATTER OF

NRA POLITICAL VICTORY FUND and
GRANT A. WILLS, as treasurer

NATIONAL RIFLE ASSOCIATION—
INSTITUTE FOR LEGISLATIVE ACTION

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on September 20, 1990, do hereby certify that the Commission decided by a vote of 4-0 to take the following actions in MUR 2991:

1. Authorize the Office of the General Counsel to file a civil suit for relief in the United States District court against the NRA Political Victory Fund and Grant A. Wills, as treasurer, and the National Rifle Association —Institute for Legislative Action.

2. Approve the appropriate letter as recommended in the General Counsel's report dated August 22, 1990.

Commisioners Elliott, Josefiak, McGarry, and Thomas voted affirmatively for the decision; Commissioners Aikens and McDonald were not present.

Attest:

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary of the Commission

9-20-90
Date

APPENDIX F

2 U.S.C. §§ 437c-438

§ 437c. Federal Election Commission

(a) *Establishment; membership; term of office; vacancies; qualifications; compensation; chairman and vice chairman.*

(1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

(2) (A) Members of the Commission shall serve for terms of 6 years, except that of the members first appointed—

(i) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1977;

(ii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1979; and

(iii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1981.

(B) A member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission.

(C) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he or she succeeds.

(D) Any vacancy occurring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.

(3) Members shall be chosen on the basis of their experience, integrity, impartiality, and good judgment and members (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government. Such members of the Commission shall not engage in any other business, vocation, or employment. Any individual who is engaging in any other business, vocation, or employment at the time of his or her appointment to the Commission shall terminate or liquidate such activity no later than 90 days after such appointment.

(4) Members of the Commission (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall receive compen-

sation equivalent to the compensation paid at level IV of the Executive Schedule (5 U.S.C. 5315).

(5) The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year. A member may serve as chairman only once during any term of office to which such member is appointed. The chairman and the vice chairman shall not be affiliated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman or in the event of a vacancy in such office.

(b) *Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office.*

(1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

(2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.

(c) *Voting requirements; delegation of authorities.* All decisions of the Commission with respect to the

exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote or any decision-making authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 437d(a) of this title or with chapter 95 or chapter 96 of title 26.

(d) *Meetings.* The Commission shall meet at least once each month and also at the call of any member.

(e) *Rules for conduct of activities; judicial notice of seal; principal office.* The Commission shall prepare written rules for the conduct of its activities, shall have an official seal which shall be judicially noticed, and shall have its principal office in or near the District of Columbia (but it may meet or exercise any of its powers anywhere in the United States).

(f) *Staff director and general counsel; appointment and compensation; appointment and compensation of personnel and procurement of intermittent services by staff director; use of assistance, personnel, and facilities of Federal agencies and departments; counsel for defense of actions.*

(1) The Commission shall have a staff director and a general counsel who shall be appointed by the Commission. The staff director shall be paid at a rate not to exceed the rate of basic pay in effect for level IV of the Executive Schedule (5 U.S.C. 5315). The general counsel shall be

paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U.S.C. 5316). With the approval of the Commission, the staff director may appoint and fix the pay of such additional personnel as he or she considers desirable without regard to the provisions of title 5, United States Code, governing appointments in the competitive service.

(2) With the approval of the Commission, the staff director may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule (5 U.S.C. 5332).

(3) In carrying out its responsibilities under this Act, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities of other agencies and departments of the United States. The heads of such agencies and departments may make available to the Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

(4) Notwithstanding the provisions of paragraph (2), the Commission is authorized to appear in and defend against any action instituted under this Act, either—

(A) by attorneys employed in its office, or

(B) by counsel whom it may appoint, on a temporary basis as may be necessary for

such purpose, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and whose compensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title. The compensation of counsel so appointed on a temporary basis shall be paid out of any funds otherwise available to pay the compensation of employees of the Commission.

§ 437d. Powers of the Commission

(a) *Specific authorities.* The Commission has the power—

(1) to require by special or general orders, any person to submit, under oath, such written reports and answers to questions as the Commission may prescribe;

(2) to administer oaths or affirmations;

(3) to require by subpena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3);

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel;

(7) to render advisory opinions under section 437f of this title;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of title 5, United States Code, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of title 26; and

(9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

(b) *Judicial orders for compliance with subpoenas and orders of Commission; contempt of court.* Upon petition by the Commission, any United States district court within the jurisdiction of which any inquiry is being carried on may, in case of refusal to obey a subpena or order of the Commission issued under subsection (a) of this section, issue an order requiring compliance. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(c) *Civil liability for disclosure of information.* No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

(d) *Concurrent transmissions to Congress or member of budget estimates, etc.; prior submission of legislative recommendations, testimony, or comments on legislation.*

(1) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of such estimate or request to the Congress.

(2) Whenever the Commission submits any legislative recommendation, or testimony, or comments on legislation, requested by the Congress or by any Member of the Congress, to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress or to the Member requesting the same. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation, to any office or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

(e) *Exclusive civil remedy for enforcement.* Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the

exclusive civil remedy for the enforcement of the provisions of this Act.

§ 437f. Advisory opinions

(a) *Requests by persons, candidates, or authorized committees; subject matter; time for response.*

(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of title 26, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

(b) *Procedures applicable to initial proposal of rules or regulations, and advisory opinions.* Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c) *Persons entitled to rely upon opinions; scope of protection for good faith reliance.*

(1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by—

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(d) *Requests made public; submission of written comments by interested public.* The Commission shall make public any requests made under subsection (a) of this section for an advisory opinion. Before rendering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.

§ 437g. Enforcement

(a) *Administrative and judicial practice and procedure.*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96

of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct

or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the

respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a

knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district

court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(10) *Repealed.*

(11) If the Commission determines after an investigation that any person has violated an

order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12) (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) *Notice to persons not filing required reports prior to institution of enforcement action; publication of identity of persons and unfiled reports.* Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification,

the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) *Reports by Attorney General of apparent violations.* Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) *Penalties; defenses; mitigation of offenses.*

(1) (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3) of this title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) of this title may incorporate a violation of section 441c(b), 441f, and 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of this title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) of this section which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

§ 437h. Judicial review

The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

§ 438. Administrative provisions

(a) *Duties of Commission.* The Commission shall—

(1) prescribe forms necessary to implement this Act;

(2) prepare, publish, and furnish to all persons required to file reports and statements under this Act a manual recommending uniform methods of bookkeeping and reporting;

(3) develop a filing, coding, and cross-indexing system consistent with the purposes of this Act.

(4) within 48 hours after the time of the receipt by the Commission of reports and statements filed with it, make them available for public inspection, and copying, at the expense of the person requesting such copying, except that any

information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee. A political committee may submit 10 pseudonyms on each report filed in order to protect against the illegal use of names and addresses of contributors, provided such committee attaches a list of such pseudonyms to the appropriate report. The Clerk, Secretary, or the Commission shall exclude these lists from the public record;

(5) keep such designations, reports, and statements for a period of 10 years from the date of receipt, except that designations, reports, and statements that relate solely to candidates for the House of Representatives shall be kept for 5 years from the date of their receipt;

(6) (A) compile and maintain a cumulative index of designations, reports, and statements filed under this Act, which index shall be published at regular intervals and made available for purchase directly or by mail;

(B) compile, maintain, and revise a separate cumulative index of reports and statements filed by multicandidate committees, including in such index a list of multicandidate committees; and

(C) compile and maintain a list of multicandidate committees, which shall be revised and made available monthly;

(7) prepare and publish periodically lists of authorized committees which fail to file reports as required by this Act;

(8) prescribe rules, regulations, and forms to carry out the provisions of this Act, in accordance with the provisions of subsection (d) of this section;

(9) transmit to the President and to each House of the Congress no later than June 1 of each year, a report which states in detail the activities of the Commission in carrying out its duties under this Act, and any recommendations for any legislative or other action the Commission considers appropriate; and

(10) serve as a national clearinghouse for the compilation of information and review of procedures with respect to the administration of Federal elections. The Commission may enter into contracts for the purpose of conducting studies under this paragraph. Reports or studies made under this paragraph shall be available to the public upon the payment of the cost thereof, except that copies shall be made available without cost, upon request, to agencies and branches of the Federal Government.

(b) *Audits and field investigations.* The Commission may conduct audits and field investigations of any political committee required to file a report under section 434 of this title. All audits and field investigations concerning the vertification for, and receipt and use of, any payments received by a candidate or committee under chapter 95 or chapter 96 of title 26 shall be given priority. Prior to conducting any audit

under this subsection, the Commission shall perform an internal review of reports filed by selected committees to determine if the reports filed by a particular committee meet the threshold requirements for substantial compliance with the Act. Such thresholds for compliance shall be established by the Commission. The Commission may, upon an affirmative vote of 4 of its members, conduct an audit and field investigation of any committee which does meet the threshold requirements established by the Commission. Such audit shall be commenced within 30 days of such vote, except that any audit of an authorized committee of a candidate, under the provisions of this subsection, shall be commenced within 6 months of the election for which such committee is authorized.

(c) *Statutory provisions applicable to forms and information-gathering activities.* Any forms prescribed by the Commission under subsection (a)(1) of this section, and any information-gathering activities of the Commission under this Act, shall not be subject to the provisions of section 3512 of title 44.

(d) *Rules, regulations, or forms; issuance, procedures applicable, etc.*

(1) Before prescribing any rule, regulation, or form under this section or any other provision of this Act, the Commission shall transmit a statement with respect to such rule, regulation, or form to the Senate and the House of Representatives, in accordance with this subsection. Such statement shall set forth the proposed rule, regulation, or form, and shall contain a detailed explanation and justification of it.

(2) If either House of the Congress does not disapprove by resolution any proposed rule or

regulation submitted by the Commission under this section within 30 legislative days after the date of the receipt of such proposed rule or regulation or within 10 legislative days after the date of receipt of such proposed form, the Commission may prescribe such rule, regulation, or form.

(3) For purposes of this subsection, the term "legislative day" means, with respect to statements transmitted to the Senate, any calendar day on which the Senate is in session, and with respect to statements transmitted to the House of Representatives, any calendar day on which the House of Representatives is in session.

(4) For purposes of this subsection, the terms "rule" and "regulation" mean a provision or series of interrelated provisions stating a single, separable rule of law.

(5) (A) A motion to discharge a committee of the Senate from the consideration of a resolution relating to any such rule, regulation, or form or a motion to proceed to the consideration of such a resolution, is highly privileged and shall be decided without debate.

(B) Whenever a committee of the House of Representatives reports any resolution relating to any such form, rule or regulation, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not

in order, and is not in order to move to reconsider the vote by which the motion is agreed to or disagreed with.

(e) *Scope of protection for good faith reliance upon rules or regulations.* Notwithstanding any other provision of law, any person who relies upon any rule or regulation prescribed by the Commission in accordance with the provisions of this section and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(f) *Promulgation of rules, regulations, and forms by Commission and Internal Revenue Service; report to Congress on cooperative efforts.* In prescribing such rules, regulations, and forms under this section, the Commission and the Internal Revenue Service shall consult and work together to promulgate rules, regulations, and forms which are mutually consistent. The Commission shall report to the Congress annually on the steps it has taken to comply with this subsection.

APPENDIX G

2 U.S.C. § 441b

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers

concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15,[1] the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include

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[1] 15 U.S.C. § 791 (h) provides:

(h) Political contributions forbidden.

It shall be unlawful for any registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly—

(1) to make any contribution whatsoever in connection with the candidacy, nomination, election or appointment of any person for or to any office or position in the Government of the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing; or

(2) to make any contribution to or in support of any political party or any committee or agency thereof.

The term "contribution" as used in this subsection includes any gift, subscription, loan, advance, or deposit of money or anything of value, and includes any contract, agreement, or promise, whether or not legally enforceable, to make a contribution.

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so

designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or facilitating the making of voluntary contributions to a separate segregated fund established

by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

APPENDIX H

11 C.F.R. § 114.5(b)(3)

§ 114.5 Separate segregated funds.

* * * *

(b) *Use of treasury monies.* Corporations, labor organizations, membership organizations, cooperatives, or corporations without capital stock may use general treasury monies, including monies obtained in commercial transactions and dues monies or membership fees, for the establishment, administration, and solicitation of contributions to its separate segregated fund. A corporation, labor organization, membership organization, cooperative, or corporation without capital stock may not use the establishment, administration, and solicitation process as a means of exchanging treasury monies for voluntary contributions.

* * * *

(3) If the separate segregated fund pays any solicitation or other administrative expense from its own account, which expense could be paid for as an administrative expense by the collecting agent, the collecting agent may reimburse the separate segregated fund no later than 30 calendar days after the expense was paid by the separate segregated fund.

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No. 93-1151

In The

Supreme Court of the United States

October Term, 1993

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

NRA POLITICAL VICTORY FUND, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Election Commission lacks authority to bring this enforcement action on the ground that section 437c(a)(1) of the Federal Election Campaign Act violates the separation of powers by directing that the Secretary of the Senate and the Clerk of the House of Representatives (or their designees) shall serve as *ex officio*, nonvoting members of the Commission.

2. Whether the Federal Election Commission lacks authority to bring this enforcement action on the ground that the Federal Election Campaign Act unconstitutionally interferes with the President's duty to "take Care that the Laws be faithfully executed" by vesting law enforcement authority in principal officers over whom the President has no removal authority.

3. Whether the Federal Election Commission lacks authority to bring this enforcement action on the ground that section 437c(a)(1) of the Federal Election Campaign Act, which provides in part that "[n]o more than 3 members of the Commission . . . may be affiliated with the same political party," is an unconstitutional infringement upon the President's power under Article II, section 2, clause 2 of the Constitution to nominate principal officers who perform executive functions.

4. Whether the payments at issue in this enforcement action violate section 441b(a) of the Federal Election Campaign Act.

RULE 29.1

In accordance with Rule 29.1 of the Rules of this Court, respondents are the National Rifle Association – Institute for Legislative Action ("ILA"), the NRA Political Victory Fund ("PVF"), and Grant Willis, Treasurer of the PVF. ILA is a component of the National Rifle Association, Inc., and the PVF is a separate segregated fund organized under section 441b(2)(c) of the Federal Election Campaign Act. There are no other parent or subsidiary companies.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Uniquely among the myriad executive and independent agencies and commissions created by Congress, the Federal Election Commission ("FEC" or "the Commission") counts among its membership two congressional agents – the Secretary of the Senate and the Clerk of the House of Representatives (or their designees). *See* 2 U.S.C. § 437c(a)(1).[1] Prior to the 1976 amendments to the Act, the Commission consisted of eight members: the six voting members were appointed – two each by the President *pro tempore* of the Senate, the Speaker of the House of Representatives, and the President – and the Secretary of the Senate and the Clerk of the House of Representatives were *ex officio* members without the right to vote.

[1] This provision is part of the Federal Election Campaign Act ("FECA" or "the Act"), 2 U.S.C. § 431 *et seq.*

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that these constitutive provisions violated the Appointments Clause[2] of the Constitution insofar as the Commissioners were charged with performing executive functions. *Id.* at 140-41. The separation of powers challenge in *Buckley*, however, was directed only at the four congressionally appointed, voting members of the Commission, so the Court did not address the constitutional status of the *ex officio* members.[3] Following *Buckley*, Congress reconstituted the FEC such that it was "composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate." 2 U.S.C. § 437c(a)(1) (1976). Congress thus left intact the portion of the original statute placing two of its agents on the Commission.[4]

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[2] U.S. Const. art. II, § 2, cl. 2.

[3] Both the Court's opinion and the parties' briefs in *Buckley* make clear that the constitutional challenge to the FEC concerned only the six voting members. *See Buckley*, 424 U.S. at 127 ("Thus with respect to four of the six voting members of the Commission, neither the President, the head of any department, nor the Judiciary has any voice in their selection."); *see also* Brief of the Appellants at 193-210, *Buckley v. Valeo* (Nos. 75-436 and 75-437) (arguing that composition of FEC violates separation of powers without mentioning *ex officio* officers); Reply Brief of the Appellants at 85-111, *Buckley* (Nos. 75-436 and 75-437) (same).

[4] While this Court's holding in *Buckley* did not require Congress to reconsider its decision to place these *ex officio* members on the FEC, Congress was not unaware of their contested constitutional status. Testifying before a Senate subcommittee in the wake of *Buckley*, then-Assistant Attorney General for the Office of Legal Counsel Antonin Scalia noted the Ford Administration's view that the nonvoting, *ex officio* members ought not be restored to the reconstituted Commission:

> We believe that the spirit of the opinion, and even the letter of the Constitution, require this result. The connection of these two officers to the legislative branch is even closer than that of the present congressionally appointed members who have the right to vote. They are not only *appointed* by Congress, but *paid* by it and *removable* by it. We believe that the absence of voting power is not determinative for constitutional purposes. The power to be present and to participate in discussions is the power to influence.

In defending against an enforcement action brought by the FEC, respondents argued, *inter alia*, that the presence of these two congressional agents on the FEC violated the Constitution's separation of powers. The court of appeals agreed, holding that, notwithstanding their *ex officio*, nonvoting status, "the mere presence of agents of Congress on an entity with executive powers offends the Constitution." App. 15a.[5] Because "Congress must limit the exercise of its influence . . . to its legislative role," App. 15a, the court held that the composition of the FEC violates the separation of powers and that the Commission thus "lacks authority to bring this enforcement action." App. 2a.

Respondents generally accept the Statement of the Case as set forth in the Petition, Pet. 3-11, with the exception (discussed in more detail below) that respondents dispute the Commission's conclusory assertion, Pet. 5, that respondents violated section 441b of the FECA.

REASONS FOR DENYING THE WRIT

The FEC raises two main arguments in support of its Petition: (1) that the court of appeals' decision misconstrues the separation of powers doctrine and, in any case, is sufficiently novel and significant to warrant review by this Court; and (2) that the court of appeals' refusal to validate the Commission's enforcement action against respondents under the *de facto* officer doctrine conflicts with this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976).

The Court should deny the Petition. While it is true that the court of appeals' ruling is, in fact, "unprecedented," Pet. 19, so too was Congress' decision to place two of its agents in a nonvoting capacity on an executive agency. In addition to the fact that this arrangement is *sui generis*, the court of appeals' ruling that the FEC's composition violates the separation of powers is manifestly correct. The court also properly rejected the Commission's argument that the *de facto*

Federal Election Campaign Act Amendments: Hearing Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 94th Cong., 2d Sess. 119 (1976) (emphasis in original).

[5] "App. ___" refers to the Appendix to the Petition for a Writ of Certiorari. "Pet. ___" refers to the Petition itself.

officer doctrine prevents the court from providing respondent any remedy based upon the constitutional violation.

Moreover, the separation of powers violation found by the court of appeals does not exhaust the constitutional defects in the structure of the FEC. First, because the members of the Commission are principal (as opposed to inferior) government officers and are responsible under the statute for the performance of certain purely executive functions, they must be subject to the Chief Executive's supervision and control with respect to their executive functions. Yet under the FECA, the President has no removal authority over Commissioners, let alone the "at will" removal authority required by the Constitution for such officers. Second, section 437c(a)(1) of the Act, which provides in part that "[n]o more than 3 members of the Commission . . . may be affiliated with the same political party," is an unconstitutional infringement upon the President's power under Article II, section 2, clause 2 of the Constitution to nominate principal officers who perform executive functions. Finally, quite apart from the Commission's constitutional deficiencies, the payments at issue in this enforcement action simply do not constitute corporate campaign contributions in violation of section 441b(a) of the Federal Election Campaign Act. Should this Court grant the Petition for a Writ of Certiorari, respondents will argue that affirmance of the court of appeals' decision is supported by these alternative and independent grounds.

1. There are compelling practical reasons for denying the writ. As far as respondents have been able to determine, the FEC is the only executive or independent agency or commission whose membership by statute includes congressional agents. The FEC likewise has not pointed to any analogous federal entities whose constitutionality is called into question by the court of appeals' ruling. Moreover, as the FEC notes, it has voted, in obedience to the court of appeals' ruling, to reconstitute itself as a six-member agency without *ex officio* congressional representation, Pet. 10-11, and there is no indication that, so constituted, the Commission's fulfillment of its statutory responsibilities is in any manner impaired. That the FEC is *sui generis* and that it can fully perform its duties without the *ex officio* members weigh heavily against the certworthiness of the petition.

2. The court of appeals' decision in this case is manifestly correct. As set forth in the Petition, Pet. 8-10, the court of appeals reversed the district court's ruling that respondents lacked standing to raise this constitutional challenge, and held that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution."[6] App. 15a.

Congress' decision to place two of its agents on the FEC, even in a nonvoting capacity, is precisely the sort of encroachment upon executive power that the Constitution forbids.[7] In *Buckley*, this Court emphasized that certain functions statutorily assigned to the FEC are purely executive in nature. The Commission's civil law enforcement authority,

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[6] By deciding the constitutional issues before addressing respondents' statutory arguments, the court of appeals knowingly departed from the general rule that federal "courts should 'refrain from passing on the constitutionality of an act of Congress unless obliged to do so.' " App. 4a (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919))). The FEC does not challenge this aspect of the decision. Moreover, the court of appeals was surely correct in holding that this "prudential rule of avoiding constitutional questions," *Zobrest v. Catalina Foothills School Dist.*, ___ U.S. ___, 113 S. Ct. 2462, 2466 (1993), does not apply when, as in this case, "plaintiffs challenge[] the constitutional composition or character of a tribunal . . . . " App. 5a (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 859 (1986), and *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56, 87 (1982)). A party defending an enforcement action brought by an entity purporting to be a government agency should not be required to defend and lose on a statutory ground before a court will consider the party's argument that the entity does not have the constitutional authority to administer or enforce the statute in the first instance.

[7] The FEC argues that "this Court has twice applied separation-of-powers analysis to federal commissions . . . with *ex officio* members from another branch, but has never found the inclusion of *ex officio* members relevant to the constitutional question." Pet. 16 (citing *Buckley*, 424 U.S. at 113, and *Mistretta v. United States*, 488 U.S. 361, 368 (1989)). However, as the court of appeals noted, "[a]lthough the Court [in *Buckley*] mentioned the *ex officio* members, it never discussed the constitutionality of their status." App. 5a-6a. The same is true of *Mistretta*, 488 U.S. at 368. The Commission's argument is accordingly without merit.

for example, is quintessentially and exclusively an executive function:

> The [FEC's] enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3.

Buckley, 424 U.S. at 138.[8]

Nor can there be any doubt that the presence of two congressional agents as members of the FEC permits Congress to influence the Commission's performance of its functions, including its executive functions. Common sense alone establishes that Congress intended its agents to influence the FEC's decisionmaking; as the court of appeals noted, "we cannot conceive why Congress would wish or expect its officials to serve as *ex officio* members if not to exercise *some* influence." App. 13a (emphasis in original). Indeed, the FEC itself acknowledges that "Congress . . . place[d] its agents in a position to try *to exert persuasive influence upon*, but not to

[8] In addition to these enforcement responsibilities, the Court held that each of "the Commission's broad administrative powers," including "rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself . . . represents the performance of a significant governmental duty exercised pursuant to a public law." *Buckley*, 424 U.S. at 140-41. "These administrative functions may . . . be exercised only by persons who are 'Officers of the United States.'" *Id.* at 141. At the same time, the Court held that the FEC also performs some non-executive tasks that are entirely consistent with the legislative function, and which may thus be performed by an FEC that includes congressional agents. *See id.* at 138. The instant enforcement action plainly implicates the FEC's executive duties.

bind or control, *the actions of executive decisionmakers*."[9] Pet. 19 (emphasis added).

Despite its admission that Congress' purpose in placing its agents on the FEC was to influence the agency in the performance of its executive functions, the Commission contends that the statutory provision naming congressional agents as *ex officio* members of the FEC "does not violate [the separation of powers] principle because the statute vests them with no authority to determine how the Commission exercises

[9] The FEC concedes that "congressional attempts to influence executive administrators can exceed lawful bounds," but argues that "the courts have required substantial proof of improper pressure on a decisionmaker and of prejudice in a particular case before relief will be provided." Pet. 19 n.11. This is a reference to the so-called "*Pillsbury*" doctrine, *see Pillsbury Co. v. FTC*, 354 F.2d 952, 964-65 (5th Cir. 1966), which "holds that the appearance of bias caused by congressional interference violates the due process rights of parties involved in *judicial* or *quasi-judicial* agency proceedings." *DCP Farms v. Yeutter*, 957 F.2d 1183, 1187 (5th Cir.), *cert. denied*, 113 S. Ct. 406 (1992) (emphasis in original); *see also D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972). While Congress' decision to place two of its employees on the Commission might well support a due process violation under the *Pillsbury* "appearance of bias" standard, respondents' separation of powers claim is altogether different.

A typical *Pillsbury* claim of unlawful congressional action necessarily focuses on specific congressional interference with a particular agency adjudication, and the lower courts have sensibly required that parties raising such a claim offer evidence that the challenged actions actually affected the agency's disposition. But where, as here, the constitutional claim is premised instead on allegations of *structural* defects in the agency, evidence of incident-specific impact is neither available nor necessary. *See, e.g., Glidden Co. v. Zdanok*, 370 U.S. 530, 533 (1962) (allowing post-judgment collateral challenge to constitutional status of judges where "claim advanced by petitioners, that they were denied the protection of judges with tenure and compensation guaranteed by Article III, has nothing to do with the manner in which either of these judges conducted himself in these proceedings."). Accordingly, contrary to the FEC's position, respondent need not present evidence that the congressional members actually influenced the Commission's decisions in this matter.

any part of its executive powers." Pet. 13. According to the FEC, the absence of voting power in the *ex officio* members conclusively establishes the permissibility of their statutory membership on the Commission. Indeed, the Commission seeks to defend the arrangement by portraying the presence of the *ex officio* members as a salutary congressional effort to facilitate interbranch dialogue. *See, e.g.*, Pet. 12; App. 15a (the "Secretary and the Clerk play a mere 'informational or advisory role' in agency decisionmaking.").

But while this Court's separation of powers decisions have made clear that the Constitution forbids arrangements in which Congress seeks to exercise determinative or coercive authority over executive functions,[10] nothing in those decisions suggests that such coercive influence is a *sine qua non* of a constitutional violation. To the contrary, under this Court's cases, *any encroachment* by one branch into the realm of another – other than through the mechanisms (*e.g.*, the Presidential veto, Senatorial advice and consent) set forth in the Constitution itself – is presumptively impermissible:

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, *as nearly as possible*, that each Branch of the government would confine itself to its assigned responsibility.

INS v. Chadha, 462 U.S. 919, 951 (1983) (emphasis added).[11]

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[10] *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983) (legislative veto); *Bowsher v. Synar*, 478 U.S. 714 (1986) (budget reduction authority granted to legislative officer); *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 111 S. Ct. 2298 (1991) ("*MWAA*") (Board of Review composed of members of Congress with veto power over decisions made by airport authority).

[11] While each branch is subject to the "hydraulic pressure . . . to exceed the outer limits of its power," *Chadha*, 462 U.S. at 951, this Court has also noted "the profound conviction of the Framers that the powers conferred on Congress were to be most carefully circumscribed." *Id.* at 947.

Nor can the FEC's logic be confined to itself. Congress would be no less justified in placing its agents – indeed, why not its members? – in offices throughout the Executive Branch. Surely Congress could better monitor and advise on developments at the Department of Justice if it required that one of its agents serve as a special assistant to the Attorney General.[12] Interbranch dialogue would no doubt be facilitated by the presence of congressional representatives at the President's Cabinet table. And what of the Judicial Branch? Congress has a legitimate role in monitoring the interpretation and application of federal law, and, in any case, it is responsible for authorizing and appropriating funds for the federal courts. Could Congress, in aid of these functions, require that one of its agents, nonvoting to be sure, sit in on this Court's deliberations?

These hypotheticals expose the fundamental flaw with the FEC's position: Congress' invasion of the Executive's domain by placing its agents on the FEC is not justified by any legitimate purpose. Surely the interbranch dialogue and information-gathering rationales advanced by the Commission are inadequate. As the court of appeals noted, "Congress enjoys ample channels to advise, coordinate, and even directly influence an executive agency. It can do so through

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[12] This scenario highlights, perhaps even more starkly than the *ex officio* membership of the FEC, the lurking executive privilege issue to which such arrangements give rise. This privilege, which "derive[s] from the supremacy of each branch within its own assigned area of constitutional duties," *United States v. Nixon*, 418 U.S. 683, 705 (1974), "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708. Simply put, an arrangement (like the composition of the FEC) that grants congressional officers automatic and unlimited access to all papers and conversations by executive decisionmakers necessarily and seriously threatens the executive branch's ability to "protect[] . . . the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Id.* at 708. While the court of appeals did not rely upon this rationale, this incursion on executive privilege further supports that court's ruling.

direct oversight hearings, appropriation and authorization legislation, or direct communication with the Commission." App. 15a-16a (footnote omitted).[13]

Nor does it help the FEC's case to claim that nonvoting congressional representation on the Commission expedites or facilitates the achievement of these informational interests. As this Court has noted, "it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency." *Chadha*, 462 U.S. at 958-59. And in *MWAA*, the Court emphatically rejected a similar argument for pragmatism and flexibility in separation of powers analysis: "One might argue that the provision for a Board of Review is the kind of practical accommodation between the Legislature and the Executive that should be permitted in a 'workable government.' " *MWAA*, 111 S. Ct. at 2312 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Despite the possibility that the congressional Board of Review "might prove to be innocuous," the *MWAA* Court instead saw in that arrangement "a blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role," and so held that the statute violated the separation of powers. *Id.*

Precisely the same analysis applies to the statutorily mandated placement of congressional agents on federal agencies that perform executive functions. The Commission's only argument in support of the constitutionality of the *ex officio* nonvoting membership on the FEC is that the arrangement is "innocuous." The court of appeals, however, properly applied this Court's precedents in holding that the Constitution does not permit such congressional incursions into the executive

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[13] Indeed, the Act explicitly safeguards these congressional prerogatives. *See* 2 U.S.C. § 437c(b)(2) ("Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.")

sphere. Because the court of appeals' ruling is correct, this Court should deny the petition.[14]

3. When a federal court announces a new rule of federal law, the court's "opinion . . . 'is properly understood to have followed the normal rule of retroactive application' and must be 'read to hold . . . that its rule should apply retroactively to the litigants then before the Court.' " *Harper v. Virginia Dept. of Taxation*, ___ U.S. ___, 113 S. Ct. 2510, 2518 (1993) (quoting *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S. Ct. 2439, 2445 (1991)). Consistent with this "normal rule," the court of appeals properly declined the FEC's request that the court accord *de facto* validity to its enforcement action against respondents. The court of appeals held, rather, that it was "aware of no theory that would permit [it] to declare the Commission's structure unconstitutional without providing relief to [respondents] in this case."[15] App. 18a.

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[14] The Commission's attempt to find a split among the circuits on the issue presented in its Petition is unavailing. Pet. 18-19 (discussing *Ameron v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986), *cert. granted*, 485 U.S. 958 (1988), *cert. dismissed*, 488 U.S. 918 (1988), and *Lear Siegler, Inc., Energy Prod. Div. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988)). The cited cases, however, concern a provision of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, which imposes an automatic stay on the awarding of any federal contract upon receipt of a protest from a disappointed bidder so that the Comptroller General may investigate the award and to make a recommendation to the relevant agency. Despite the FEC's strained attempt to analogize those cases to the instant matter, they obviously say nothing at all about the constitutionality of congressional agents serving as *ex officio*, nonvoting members of an executive agency.

[15] The court of appeals might have cited in support of this proposition *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where this Court, having determined that Mr. Marbury had a "vested legal right" in his presidential commission to serve as a justice of the peace, asked the question: "If he has a right, and that right has been violated, do the laws of this country afford him a remedy?" *Id.* at 154. Noting that "[t]he government of the United States has been emphatically termed a government of laws, and not of men," *id.* at 163, the Court answered that "[i]t will

The Commission renews before this Court its extraordinary argument that, even if the FEC's statutory composition violates the separation of powers, the Commission's enforcement action against respondents, including the $40,000 fine imposed by the district court, should be deemed valid under the *de facto* officer doctrine. The FEC contends that the court of appeals' failure to do so conflicts with this Court's remedial disposition in *Buckley*. *See* 424 U.S. at 142. But as the court of appeals correctly noted, *Buckley* was an action for declaratory and injunctive relief that "could have purely prospective impact." App. 17a (citing *Buckley*, 424 U.S. at 9). There could thus be no claim that the plaintiffs in *Buckley* prevailed but were not granted a remedy; they got precisely the remedy they sought.

By contrast, this constitutional challenge arises in the context of a defense to an enforcement action.[16] Respondents' claim is simply that the FEC lacks constitutional authority to take the actions that it has against respondents. The FEC's answer is that the question of its constitutional authority is irrelevant, that it has authority to enforce a federal law against respondents despite the fact that it does not satisfy the

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certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* In light of *Marbury*, the Commission's acknowledgement that respondents have a legitimate "constitutional interest . . . in having the law enforced against them at the behest of an agency whose composition conforms to the Constitution," Pet. 24, would seem conclusively to establish the propriety of the court of appeals' remedial disposition.

[16] The FEC appears to argue that respondents could only raise this separation of powers claim pursuant to the Act's provision authorizing voters to bring a declaratory judgment action challenging its constitutionality. Pet. 23 n.14; *see* 2 U.S.C. § 437h. It suffices to note that the Commission does not offer any support for the bizarre notion that the express provision for a declaratory judgment action somehow extinguishes a party's ability to raise constitutional claims as a defense to an enforcement action brought by a government agency.

Constitution's requirements for holding such authority. Had the Appointments Clause challenge in *Buckley* arisen in the context of a defense to an enforcement action, this Court, according to the Commission, would have upheld the FEC's actions against Mr. Buckley and the other plaintiffs, including, for example, any fines imposed, notwithstanding the Court's determination that the Commission was unconstitutionally composed. The FEC is understandably unable to cite any case law supporting such a result.[17]

The implications of the FEC's argument extend well beyond the denial of a remedy to parties who successfully assert separation of powers challenges to government enforcement actions. If, as the Commission contends, the *de facto* officer doctrine prohibits a federal court from granting a remedy under those circumstances, then it necessarily follows that federal courts do not have jurisdiction even to entertain such constitutional defenses. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 505 (1975) (plaintiffs lack standing where alleged injury is not redressable by court); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (same). Indeed, the FEC was forthright before the court of appeals about this jurisdictional implication of its *de facto* officer argument, contending that respondents lacked standing to raise their constitutional defenses. *See* App. 17a n.6. The court of appeals, however, correctly rejected "an interpretation of the

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[17] This case does not present the question whether other parties currently defending enforcement actions brought by the FEC are entitled to the same relief as respondents. In support of its Motion for Expedited Consideration filed concurrently with the Petition, the Commission argued that the court of appeals' decision in this case has caused confusion in numerous other enforcement actions currently being prosecuted by petitioner in the federal courts. (This Court denied petitioner's Motion in an Order dated January 24, 1994.) While respondents are confident that the lower federal courts are capable of determining what effect (if any) the court of appeals' decision in this matter will have on other FEC enforcement actions, that issue is altogether separate from the issues raised in this case, and the existence of those parallel proceedings thus affords no basis for this Court to grant the Petition.

de facto officer doctrine that would likely make it impossible for [respondents] to bring their assumedly substantial constitutional claims and would render legal norms concerning appointment and eligibility to hold office unenforceable." *Id.* (quoting *Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984)).

For the foregoing reasons, respondents respectfully submit that the appellate court's ruling does not warrant this Court's review. There are, however, at least three other adequate and independent legal grounds – two constitutional and one statutory – supporting the court of appeals' judgment. We will briefly discuss each ground in turn.

4. First, by vesting law enforcement authority in principal officers over whom the Executive has no removal authority, the Act unconstitutionally impairs the President's ability to "take Care that the Laws be faithfully executed." Art. II, sec. 3. The court of appeals concluded that "there is not much vitality to the [removal] claim after *Morrison v. Olson*, 487 U.S. 654 (1988)." App. 11a (parallel citations omitted). The court also questioned the premise of the claim – that the President has no power of removal over FEC Commissioners – stating that it could "safely assume that the President would at a minimum have authority to discharge a Commissioner for good cause – if for no other." App. 12a.

To begin with the latter point, the Act itself is silent on the question of removal. *See* App. 12a. While it is true that "at will" presidential removal power may inhere in a power to appoint officers, *see, e.g., Shurtleff v. United States*, 189 U.S. 311, 316 (1903), such an interpretation here would obviously conflict with the Act's structure and legislative history confirming the intent of Congress to ensure the FEC's independence from presidential control.[18]

Nor is the removal issue resolved by assuming that the Act grants the President "good cause" removal power over

[18] *See, e.g.*, H.R. Rep. No. 1239, 93rd Cong., 2d Sess. 8 (1974); 122 Cong. Rec. S3686, H2535, S6364 (1976) (statements of Sen. Clark, Rep. McHugh, and Sen. Cannon).

Commissioners. First, such an assumption would require the Court somehow to coax from the statute's *silence* on the issue not only a power to remove, but also particular limitations on that power – in essence, a removal "code." More importantly, such a limited presidential removal power over FEC Commissioners would not satisfy constitutional standards. Prior decisions of this Court upholding "good cause" limitations on the President's removal power over government appointees do not counsel otherwise. For example, the officers at issue in both *Humphrey's Executor v. United States*, 295 U.S. 602 (1935),[19] and *Wiener v. United States*, 357 U.S. 349 (1958), lacked the authority, which FEC Commissioners manifestly enjoy, to enforce a statute by seeking judicial imposition of a civil penalty – the power that gives rise to this instant case, and one that this Court has consistently recognized to be at the core of Executive Branch functions.[20] By contrast, this Court characterized the powers possessed by the FTC Commissioners in *Humphrey's Executor* and the members of the War Claims Commission in *Wiener* as "quasi-legislative" or "quasi-judicial."[21]

[19] *Humphrey's Executor* is further distinguishable, of course, in that the FTC statute at issue in that case expressly provided for presidential removal for "inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 619. There was thus no statutory silence to interpret.

[20] *See Buckley*, 424 U.S. at 138 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' "); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch . . . . "); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . . ").

[21] In *Humphrey's Executor*, the Court stated that the FTC "cannot in any proper sense be characterized as an arm or an eye of the executive," 295 U.S. at 628, and held that "[t]o the extent it exercises any executive function, as distinguished from executive power in the constitutional sense,

Similarly, the FECA is wholly lacking in the type of statutory protections of Executive Branch prerogatives that this Court in *Morrison* found essential to the validity of the "good cause" limitation on removal of an "independent counsel" appointed under the Ethics in Government Act of 1978. *Morrison v. Olson*, 487 U.S. 654 (1988). As the Court emphasized:

> No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment . . . is committed to his unreviewable discretion. The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not "possible" to do so. . . . [I]n our view *these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.*

Id. at 696 (emphasis added). It is clear that the Executive Branch exercises no similar control over the Commissioners on the FEC. The *Morrison* Court also noted that the office of independent counsel was a "temporary" office, "appointed essentially to accomplish a single task." 487 U.S. at 672. In addition, the independent counsel had no "authority to formulate policy for the Government or the Executive Branch." *Id.* at 671. Again, the powers of the FEC stand in stark contrast,

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it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government." *Id.* The FTC plainly did not possess civil enforcement authority. The powers of the War Claims Commission were even farther removed from the executive realm, as that body was established solely to "adjudicate according to law" three narrow classes of claims against Japan. *Wiener*, 57 U.S. at 354.

for it is empowered to "administer, seek to obtain compliance with, and formulate policy with respect to" the federal election campaign laws, and it has "exclusive jurisdiction with respect to the civil enforcement of such [laws]." 2 U.S.C. 437c(b)(1). And while the independent counsel is an inferior officer "subject to removal by a higher Executive Branch official" (*i.e.*, the Attorney General), there is no such official to whom the Commissioners are " 'inferior' in rank and authority." *Morrison*, 487 U.S. at 671.

In sum, because the President has no power to remove FEC Commissioners, let alone the "at will" removal power constitutionally required for such officers, the FECA unconstitutionally impairs the President's ability to "take Care that the Laws be faithfully executed."

5. Second, the FEC impermissibly limits the Executive's power under the Appointments Clause to nominate principal officers who perform executive functions. The Act provides in part that "[n]o more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party." 2 U.S.C. § 437c(a)(1). Article II, section 2, clause 2 of the Constitution, however, explicitly assigns to the President illimitable power to nominate principal officers of the United States. The court of appeals held that this Appointments Clause claim was nonjusticiable, reasoning that while such restrictions "may raise serious constitutional questions, . . . it is impossible to determine in this case whether the *statute* actually limited the President's appointment power." App. 8a. (emphasis in original) The court of appeals concluded that it could not determine whether the statute itself, or simply the President's perception of how the Senate intended to exercise its advice and consent prerogative, accounted for the Commission's perfectly bipartisan make-up.

But while the Senate's advice and consent role surely provides that body determinative influence over the ultimate composition of the FEC, the Constitution grants "[n]o role whatsoever . . . either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment." *Public Citizen v. U.S. Dept. of Justice*, 491

U.S. 440, 483 (1989) (Kennedy, J., concurring in the judgment).[22] And it is no answer to the Act's clear infringement of this principle to say that the President may have desired a bipartisan Commission absent the statutory requirement to that effect. The undeniable fact is that the President has complied with the law as enacted, thus raising more than an inference that the statute has had its desired effect. Moreover, the statutory requirement constitutes a *congressional* (*i.e.*, bicameral) limitation on the President's appointment power, while only the Senate is granted advice and consent authority; to equate the effect of the statute with the possible impact of the Senate's role is thus unjustified. This violation of the Appointments Clause provides an independent basis for the court of appeals' judgment.

6. Finally, the premise of the instant enforcement action – that the payment at issue violated section 441b(a) of the Act – is simply wrong. As set forth more fully in the Petition, *see* Pet. 5-6, the district court opinion, *sec* App. 20a-22a, and the court of appeals decision, *see* App. 2a-4a, this enforcement action is based on the FEC's allegation that the October 20, 1988, payment from the National Rifle Association – Institute for Legislative Action to the NRA Political Victory Fund ("PVF")[23] constituted an impermissible corporate campaign "contribution" in violation of section 441b(a), rather than, as respondents contend, a permissible reimbursement for expenses connected with PVF's direct solicitation of members. *See* 2 U.S.C. § 441b(b)(2)(C). The district court rejected

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[22] The exclusion of congressional influence from the nomination decision was unmistakably part of the Framers' design. *See, e.g.*, The Federalist No. 66, at 449 (A. Hamilton) (J. Cooke ed., 1961) ("It will be the office of the president to *nominate*, with the advice and consent of the senate to *appoint*. There will of course be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*: they can only ratify or reject the choice, of the president.") (emphasis added).

[23] PVF is a "separate segregated fund," or political action committee, organized and registered in accordance with the Act.

respondents' statutory arguments, and the court of appeals did not address them.

The statute plainly permits segregated funds such as PVF to solicit members with funds provided by a parent entity. *See* 2 U.S.C. § 441b(b)(2)(C). The district court's wholly unsubstantiated conclusion that "the motivation for making the payment does not render it lawful," App. 22a, frustrates this statutory exemption where, as here, the record shows that respondents intended to, and in fact did, act in compliance with the statute. Quite apart, therefore, from the FECA's constitutional infirmities, the court of appeals' decision is supported as well on the ground that respondents did not violate the statute.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: February 17, 1994

Respectfully submitted,

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No. 93-1151

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER

v.

NRA POLITICAL VICTORY FUND, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

1. a. Respondents have failed entirely to present any basis for concluding that the decision below, which held unconstitutional a provision of an act of Congress and invalidated the structure of a federal agency charged with civil enforcement of the laws protecting the integrity of our national elections, is not important enough to warrant plenary review by this Court. Respondents argue (Opp. 3-4) that there are no other agencies structured like the Commission, but we have shown (Pet. 16) that the Sentencing Commission, reviewed by this Court in *Mistretta v. United States*, 488 U.S. 361 (1989), also included an *ex officio* member from another branch. More importantly, most of the cases in which this Court has reviewed separation-of-powers challenges have in-

volved structural features that were similarly uncommon. *See, e.g., Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Mistretta v. United States*, 488 U.S. 361 (1989); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986). The invalidation of a federal statute is not diminished in importance by Respondents' view (Opp. 4) that the agency structure enacted by Congress is not really needed for adequate administration of the law. Deciding whether a duly enacted federal statute should be invalidated for violation of the Constitution's separation-of-powers requirement is "a responsibility of this Court as ultimate interpreter of the Constitution." *United States v. Nixon*, 418 U.S. 683, 704 (1974) (internal quotation marks omitted).

b. Respondents concede that "it is true that the court of appeals' ruling is, in fact, 'unprecedented' " (Opp. 3). They have not attempted to controvert the Commission's showing (Pet. 18-19) that the unprecedented separation-of-powers analysis of the decision below conflicts with the law of two other circuits; they do attempt (Opp. 11 n.14) to distinguish those cases on the basis of the titles, rather than the powers, of the *ex officio* members of the Commission, but this Court has admonished that separation-of-powers analysis does not turn on labels. *See Mistretta*, 488 U.S. at 393; *Morrison*, 487 U.S. at 689.

Respondents also present no basis for their hyperbolic claim (Opp. 9) that a decision allowing non-voting *ex officio* members to serve on this bipartisan independent agency, performing both legislative and executive functions, would necessarily authorize Congress to place its agents "throughout the Executive

Branch," even "at the President's Cabinet table." Because the separation-of-powers doctrine focuses upon the extent to which a statutory provision "prevents the Executive Branch from accomplishing its constitutionally assigned functions," *Mistretta*, 488 U.S. at 361 (*quoting Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)), the particular relationship of a function to the President's constitutional role may be determinative. *See Morrison*, 487 U.S. at 690 ("[T]here are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role"). Upholding the constitutionality of *ex officio* members in the particular context of this independent agency would not require the Court to decide where the line must be drawn, any more than it did in *Morrison*.

In sum, Respondents cannot alter the facts supporting the Commission's petition. A federal court has held unconstitutional a provision of an act of Congress and has invalidated the composition of a federal agency charged with civil enforcement of an important area of federal law. It has done so on the basis of a novel expansion of the separation-of-powers doctrine beyond this Court's precedents and in conflict with the views of two other circuits. Whether the Court ultimately affirms or reverses the ruling of the court of appeals, such a decision clearly warrants plenary review.

2. Although they filed no cross-petition for writ of certiorari, Respondents list (Opp. i) three additional issues, not presented in the petition, that they ask this Court to review. The court of appeals explicitly rejected (Pet. App. 8a-12a) Respondents' arguments on the two constitutional issues (questions 2 and 3),

while Respondents' arguments on the merits of the case (question 4) were rejected by the district court, whose findings have not yet been reviewed by the court of appeals.

Respondents assert (Opp. 14) that these additional issues represent alternative grounds for affirming the judgment below. However, none of these issues is a "necessary predicate to the resolution of the question[s] presented in the petition," *Caspari v. Bohlen*, No. 92-1500, 1994 WL 50780, at *5 (U.S. Feb. 23, 1994), and this Court need not entertain issues alleged to be alternative grounds for affirmance if they are not "of sufficient general importance to justify the grant of certiorari," *United States v. Nobles*, 422 U.S. 225, 241 n.16 (1975). Respondents have not claimed that the lower court decision on any of these issues is in conflict with the precedents of this Court or any other lower court, nor have they shown any other reason why the resolution of these issues against them is "of sufficient general importance" to warrant a grant of certiorari. Accordingly, we suggest that it would serve the interests of judicial economy for the Court to avoid unnecessary briefing and consideration of these extraneous issues by explicitly limiting a grant of certiorari in this case to the issues specified in the petition. *See also, Yee v. City of Escondido*, 112 S.Ct. 1522, 1532, 1533 (1992).

a. Respondents' summary assertion (Opp. 18-19) that the district court erred in finding that they violated the Act involves only the application of the statutory terms and the Commission's regulations to the particular facts of this case. The district court's findings were in accord with the Commission's expert construction of the statute, and Respondents cite no adverse judicial precedent. Such an issue plainly does

not warrant review by this Court, particularly since this judgment would be subject to the usual review by the court of appeals upon remand if this Court reinstates the Commission's lawsuit.

b. Respondents again cite no authority supporting their bizarre argument (Opp. 14) that it is a violation of separation-of-powers requirements for a statute to contain no provision governing the President's authority to remove agency members. This Court has long recognized Congress's authority to create independent agencies and "fix the period during which [their members] shall continue in office, and to forbid their removal except for cause in the meantime," *Morrison*, 487 U.S. at 687 (*quoting Humphrey's Executor v. United States*, 295 U.S. 602 (1935)). The Court has also acknowledged that statutory limits on the presidential power to remove some executive officials might be constitutionally suspect. *Morrison*, 487 U.S. at 690.[1] But neither this Court, nor any lower court, has ever remotely suggested that the absence of any statutory provision governing the President's removal power could be unconstitutional. To the contrary, this Court cited the absence of any provision in this Act "specify[ing] a removal procedure" for Commissioners as being typical of "[t]he statutes establishing independent agencies," and contrasted it with the features of the removal provision found unconstitutional in *Bowsher v. Synar*, 478 U.S. at 725 n.4.

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[1] This Court has never found special provisions for continuing presidential control of the sort discussed in *Morrison*, 487 U.S. at 696, quoted by Respondents (Opp. 16), to be constitutionally required for independent agencies whose members, unlike the independent counsel, are appointed by the President.

Respondents in effect ask this Court to *infer* from statutory silence some unstated limits on the President's power to remove Commissioners, and then to hold such limits unconstitutional. But this Court will construe an ambiguous statute in a manner that avoids, rather than creates, such constitutional issues, *see, e.g., Morrison*, 487 U.S. at 682, and the lower courts have construed such silence in similar statutes to permit presidential removal for cause. *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677 (10th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989); *SEC v. Bilzerian*, 750 F. Supp. 14 (D.D.C. 1990). However, because there is no reason for this Court to anticipate whether, or to what extent, the Act should be construed to limit the President's removal power until a President seeks to exercise it, this issue is not even ripe for consideration on the facts of this case.

c. The provision in 2 U.S.C. § 437c(a)(1) that "no more than 3 [of the six] members of the Commission" appointed by the President "may be affiliated with the same political party" simply sets the necessary qualifications for the members of a bipartisan agency. While the President is entitled, pursuant to Article II, section 2, clause 2 of the Constitution, to choose the individuals to nominate as Commissioners, it has long been recognized that "[i]t is entirely proper for Congress to specify the qualifications for an office it has created." *Bowsher v. Synar*, 478 U.S. at 740 (Stevens, J., concurring). *See also, Myers v. United States*, 272 U.S. 52, 265-274, nn.35, 36 (Brandeis, J., dissenting). Such bipartisanship requirements have long been common for independent agencies,[2] and this Court has specifically recognized

[2] Congress has enacted bipartisan structures for, *e.g.*, the Securities & Exchange Commission, 15 U.S.C. § 78d(a); the Federal Trade Commission, 15 U.S.C. § 41; the Federal Energy Regulatory Commission, 42 U.S.C. § 7171(b); the Equal Employment Opportunity Commission, 42 U.S.C. § 2000e-4(a); the Interstate Commerce Commission, 49 U.S.C. § 10301(b); and the United States Sentencing Commission, 28 U.S.C. § 991(a), which was found constitutional in *Mistretta v. United States*, 488 U.S. 361 (1989).

the value of an "inherently bipartisan" agency to "decide issues charged with the dynamics of party politics." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981). Respondents cite no authority whatever that even remotely supports their argument (Opp. 17-18) that this long-established legislative practice might be unconstitutional.

In fact, nothing in the Act suggests that the bipartisanship requirement is a judicially enforceable restriction on the President's power to nominate individuals to become Commissioners, rather than a directory provision enforceable only through the Senate's confirmation power. The Executive Branch has repeatedly opined that such provisions are merely "advisory," *Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990*, 25 Weekly Comp. Pres. Doc. 1851, 1852 (Nov. 20, 1989), and thus do "not constrain the President's constitutional authority to appoint officers of the United States," *Statement on Signing the Cranston-Gonzalez National Affordable Housing Act*, 26 Weekly Comp. Pres. Doc. 1930, 1931 (Nov. 28, 1990). Since the Act plainly permits such a construction, the courts would be obligated to adopt it if a legally binding restriction were thought unconstitutional. *See supra* p. 6. But because all the Commissioners who participated in this case were nominated by the President and confirmed by the Senate, resolution of this question of

statutory construction would have no effect on the outcome of this case. Thus, like the question of the President's removal power, this issue is not ripe for consideration on the facts of this case.

CONCLUSION

For the reasons stated above and in the Commission's petition, the Federal Election Commission's petition for a writ of certiorari should be granted, and the issues to be reviewed should be limited to those stated in the petition.

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QUESTION PRESENTED

Whether the Federal Election Commission has statutory authority to represent itself in this Court in this case.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE FEDERAL ELECTION COMMISSION IN RESPONSE TO THE SOLICITOR GENERAL

STATUTORY PROVISIONS INVOLVED

Most of the relevant statutory provisions are reprinted in Appendix F (App. 42a-67a) of the Petition for Certiorari filed by the Commission on January 18, 1994. The original version of 2 U.S.C. § 437h (1970 ed. Supp. IV) is reprinted in the appendix at the back of this brief.

STATEMENT

The opinions below, the basis for jurisdiction, and the statement of the facts of this case are all set out in the Commission's Petition for Certiorari at pp. 1-11.

SUMMARY OF ARGUMENT

The Federal Election Commission was created in response to the Watergate crisis. In an effort to re-establish public confidence in the integrity of the federal election

system, Congress removed civil enforcement of the campaign financing statutes from the Department of Justice, which is subject to the partisan influence of the President, and entrusted it instead to an agency that is both independent and nonpartisan. Congress implemented this policy by giving the Commission "exclusive jurisdiction with respect to the civil enforcement" of the Federal Election Campaign Act ("the Act" or "FECA"), 2 U.S.C. § 437c(b)(1), including the authority "to initiate . . . defend . . . or appeal any civil action in the name of the Commission to enforce the provisions of this Act . . . through its general counsel," 2 U.S.C. § 437d(a)(6). The Commission has exercised this authority for almost two decades by conducting its own litigation in the Supreme Court without seeking authorization from the Solicitor General. This Court has never questioned, and no previous Solicitor General has ever objected to, the Commission's exercise of this statutory litigation authority.

Congress can, if it chooses, assign authority to conduct litigation in this Court to agencies other than the Solicitor General, and whether a particular statute does this is determined using "the ordinary tools of statutory construction," *United States v. Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988). In this case, the language of section 437d(a)(6), the structure and evident purpose of the Act, and the legislative history all support the conclusion that Congress intended to give the Commission complete control of civil litigation under the Act at all levels of the judiciary, without the supervision of the Department of Justice.

Since the critical statutory term "appeal" is not defined in the Act, it should be given its ordinary meaning, which includes all mandatory and discretionary procedures for review of lower court decisions. The term "appeal" and its derivatives are used in this way both in the Constitution and in other relevant statutes. Thus, the normal meaning of the statutory authorization to "appeal all civil cases"

includes seeking review of lower court decisions in this Court.

The structure of the Act confirms this meaning. The statute's overall design evidences an intent to entrust complete control of civil enforcement of the campaign finance laws, at both administrative and judicial levels, to a nonpartisan agency. More specifically, the *only* appeal available in cases litigated by the Commission under 2 U.S.C. § 437h is to this Court on petition for certiorari. Thus, applying the language of section 437d(a)(6) empowering the Commission to "appeal *any* civil case" arising under the Act to the procedures in section 437h necessarily results in the Commission's being authorized to file petitions for certiorari.

The legislative history of section 437d(a)(6) demonstrates that removing the civil enforcement of the Act in its entirety from the control of the Justice Department was the actual intent of Congress. The language in section 437d(a)(6) originated in a bill to create an independent Federal Election Commission adopted by the Senate in 1973, and the hearings and floor debates on that bill repeatedly stressed the intention to insulate enforcement of the Act from partisan influence by transferring it from the Justice Department to an independent and nonpartisan agency. A witness representing the Justice Department objected to the bill's transfer of Supreme Court litigating authority from the Solicitor General to the Commission, but the Committee neither disclaimed this view of the bill's purpose nor made any changes to accommodate the objection. Although the House failed to consider the 1973 bill, the statute finally enacted in 1974 incorporated most of its language establishing and empowering the Commission, and the only relevant change from the 1973 bill to the language now codified in 2 U.S.C. § 437d(a)(6) was to delete references to criminal prosecutions, which remained with the Justice Department. This shows the in-

tent of Congress to give the Commission, in section 437d (a)(6), control of all civil litigation arising under the Act, at all levels of the judiciary.

The Solicitor General relies in effect upon the general maxim *expressio unius est exclusio alterius,* pointing to the language of two other statutes administered by the Commission, 26 U.S.C. §§ 9010(d) and 9040(d), both of which explicitly authorize the Commission to file petitions for certiorari. This Court has previously noted the doubtful basis of the *expressio unius* maxim, and it certainly cannot overcome the force of the language, structure, and legislative history of the Act itself. That maxim is entirely inapplicable here because the provisions whose language the Solicitor General seeks to contrast are from separate statutes codified in different Titles of the United States Code, were drafted by different Congresses in different years, and were originally drafted to apply to different agencies of the government. The statutory scheme that would result from the Solicitor General's construction would create a senseless patchwork of conflicting and redundant litigating authority that cannot reasonably be attributed to Congress. Accordingly, the Solicitor General has failed to provide the substantial justification that would be required to reject the Commission's established construction of the Act and the unchallenged practice of almost two decades of litigation in this Court.

ARGUMENT

I. THE FEDERAL ELECTION CAMPAIGN ACT, IN 2 U.S.C. § 437d(a)(6), AUTHORIZES THE FEDERAL ELECTION COMMISSION TO CONDUCT LITIGATION AT ALL LEVELS OF THE JUDICIARY INDEPENDENT OF THE DEPARTMENT OF JUSTICE

> [I]t is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935). The Watergate crisis in 1973 demonstrated dramatically the danger to democratic government from this inherent conflict of interest faced by public officials subservient to the President. The public outcry over the disclosures of misuse of office by the Attorney General and other government officials to support the President's reelection campaign, and the firing of the Watergate Special Prosecutor on orders from the White House by the Solicitor General, serving as Acting Attorney General, *see generally* In re *Olson,* 818 F.2d 34, 41-42 (D.C. Cir. 1987), led to substantial remedial legislation.

Congress created the Federal Election Commission in 1974, in direct response to Watergate. Congress sought thereby to restore public confidence in the integrity of the election process by taking civil enforcement of the campaign finance laws out of the hands of the Justice Department and assigning it instead to an independent, nonpartisan agency. As the Solicitor General acknowledges (Br. 12-13), this congressional purpose is applicable to control of the Commission's litigation, most of which involves "issues charged with the dynamics of party politics," *FEC v. Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 37 (1981). The Justice Department's conflict of interest in this area is demonstrated most acutely by litigation the

Commission has conducted against the incumbent President's own campaign committee, In re *Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538 (D.C. Cir. 1980); *Reagan for President Comm. v. FEC*, 734 F.2d 1569 (D.C. Cir. 1984); *Reagan-Bush Comm. v. FEC*, 525 F. Supp. 1330 (D.D.C. 1981), and even against the Department of Justice itself. *Buckley v. Valeo*, 424 U.S. 1 (1976) (separation of powers issue); *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.) (en banc), *aff'd mem. sub nom. Clark v. Kimmit*, 431 U.S. 950 (1977); *Galliano v. United States Postal Service*, 836 F.2d 1362 (D.C. Cir. 1988).

Congress implemented this policy in 2 U.S.C. § 437c (b)(1), which grants the Commission "exclusive jurisdiction with respect to the civil enforcement" of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), 2 U.S.C. §§ 431-455. As part of that exclusive jurisdiction, Congress gave the Commission broad independent authority "to initiate . . ., defend . . . or appeal any civil action in the name of the Commission to enforce the provisions of this Act . . . through its general counsel," 2 U.S.C. § 437d(a)(6). It also authorized the Commission to both "appear in and defend against any action instituted under this Act" either "by attorneys employed in its office" or "by counsel whom it may appoint, on a temporary basis as may be necessary for such purpose," 2 U.S.C. § 437c(f)(4). Congress placed no specific restrictions on the Commission's civil litigating authority, and it made no provision for the Department of Justice to participate in any way in the civil enforcement of the Act.

The Commission has, as the Solicitor General concedes (Br. 8 n.6), consistently exercised this statutory authority by representing itself, without seeking the Solicitor General's authorization, in numerous cases before this Court during its 19 years of existence.[1] Neither this Court nor

[1] The Solicitor General's brief lists only cases involving both argument and decision on the merits. The Commission also represented itself in one case resolved after argument by an equally divided

any party in litigation has ever before questioned the Commission's authority to do so.

In fact, although the Commission has routinely provided copies of its Supreme Court briefs and petitions to the Solicitor General's Office, no previous Solicitor General has claimed a right under 28 U.S.C. § 518(a) to control the Commission's litigation in this Court.[2] " '[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.' " *Bankamerica Corp. v. United States*, 462 U.S. 122, 131 (1983) (quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 351 (1941)). The Solicitor General's " 'failure to use such a power for a long time indicates' " that the Solicitor General's Office, like the Commission, " 'did not believe the power existed.' " *Bankamerica*, 462 U.S. at 131 (quot-

Court, *Common Cause v. Schmitt*, 455 U.S. 129 (1982) (constitutionality of 26 U.S.C. § 9012(f)), and as appellee in three cases that resulted in summary affirmance: *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.), *aff'd mem. sub nom. Clark v. Kimmit*, 431 U.S. 950 (1977) (justiciability of a challenge to constitutionality of 2 U.S.C. § 438(d)); *International Ass'n of Machinists v. FEC*, 678 F.2d 1092 (D.C. Cir.) (en banc), *aff'd mem.*, 459 U.S. 983 (1982) (constitutionality of portions of 2 U.S.C. § 441b(b)); *Republican National Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), and 616 F.2d 1 (2d Cir.) (en banc), *both decisions aff'd mem.*, 445 U.S. 955 (1980) (constitutionality of 2 U.S.C. § 441a (b)(1)(B) and 26 U.S.C. § 9003(b)). The Commission has filed petitions for certiorari and briefs in opposition in numerous other cases without seeking authorization from the Solicitor General.

[2] In 1989, a Deputy Solicitor General inquired informally about the Commission's authority to file a brief as *amicus curiae* in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). The Commission's Associate General Counsel responded with a letter explaining the basis of the Commission's statutory authority to conduct its own litigation in this Court, and the Solicitor General did not object when the Commission filed its *amicus* brief. A copy of this letter is printed in the appendix to this brief.

ing *FPC v. Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 513 (1949)).

As with any issue of statutory interpretation, the Commission's consistent construction of 2 U.S.C. § 437d(a)(6) as authorizing it to conduct all of its own appellate litigation, including in this Court, is entitled to substantial deference, *FEC v. Democratc Senatorial Campaign Comm.*, 454 U.S. at 37. Such deference can only be enhanced by the Solicitor General's longstanding practice of acquiescing in the Commission's exercise of this independent litigating authority. *See FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986). The Commission's authority is by now so well established that the leading treatise on Supreme Court practice has concluded that section 437d (a)(6), like 26 U.S.C. § 9010(d), authorizes the Commission to "act through its own counsel, rather than through the Solicitor General, in mapping its appellate strategy." Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 68 n.56 (7th ed. 1993). The language, structure, and legislative history of the Act supply no justification for the sudden reversal of this practice represented by the Solicitor General's claim in this case of authority to control all of the Commission's litigation under the FECA in this Court.

A. The Language and Structure of the Act

In 28 U.S.C. § 518(a), Congress entrusted to the Attorney General and the Solicitor General the general authority to represent the federal government in litigation in the Supreme Court. The Court held in *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), that in the absence of any other applicable statute section 518(a) is controlling. However, the Court also noted that, the general authority granted by section 518(a) having been created by statute, "Congress, if it so chooses" can "exempt litigation from the otherwise blanket coverage" of section 518(a). *Id.* at 705 n.9.

The Court did not recognize in *Providence Journal* any presumption against statutory assignment of litigating authority to others, nor did it suggest that Congress would have to use particular technical wording or legislate with unusual clarity to accomplish this purpose. To the contrary, the Court specified that construction of such a statute would be based on application of "the ordinary tools of statutory construction to determine whether Congress intended" to exempt litigation from the otherwise blanket authority of the Solicitor General. 485 U.S. at 705 n.9. In fact, the Court noted three statutes that "suggest exceptions to the blanket coverage of § 518(a)," *id.*, none of which contained any express reference to section 518(a), the Supreme Court, or petitions for certiorari.

Providence Journal thus refutes the Solicitor General's argument (Br. 9), relying upon a decision involving the presumption against implied repeal of a statute, that there must be "clear and manifest" evidence of congressional intent to authorize independent litigation in this Court. Such a presumption has no role in resolving the issue presented here, involving the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination," *United States v. Fausto*, 484 U.S. 439, 453 (1988).[3] Reconciling a general provision like section 518(a) with the specific

[3] The presumption cited by the Solicitor General is only against "[r]epeal by implication of an express statutory text," because "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change." *Fausto*, 484 U.S. at 453. There is no express text in 28 U.S.C. § 518(a) referring to litigation under the FECA that would have to be changed to accommodate the narrow impact of section 437d(a)(6). Continued recognition of the Commission's independent litigating authority in this specific area would not affect the Solicitor General's authority under section 518(a) to represent the government in all cases that Congress has not assigned elsewhere, and even to represent the interests of "the United States," 28 U.S.C. § 518(a), in those cases the Commission litigates "in the name of the Commission," 2 U.S.C. § 437d(a)(6).

authority conferred upon the Commission by section 437d (a)(6) implicates instead "the principle that a more specific statute will be given precedence over a more general one." *Busic v. United States*, 446 U.S. 398, 406 (1980). *See also Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 375 (1990).

The language of section 437d(a)(6) is broad and unrestricted. It authorizes the Commission not only to "initiate" and "defend" in the first instance, but also to "appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel." The Act contains no provision assigning any role whatever in the Commission's civil litigation to the Solicitor General or any other officer of the Department of Justice. *Compare, e.g.*, 5 U.S.C. § 7105(h) (authorizing independent litigation by agency "[e]xcept as provided in section 518 of Title 28, relating to litigation before the Supreme Court"); 5 U.S.C. § 1204(i) (same); 42 U.S.C. § 7171(i) (same).

The critical statutory term "appeal" is not defined in the Act. The Solicitor General argues that this term should be confined strictly to its narrowest technical use in contrasting appeals of right from this Court's discretionary appellate jurisdiction, which would exclude from section 437d(a)(6) cases reviewed by this Court on petition for certiorari. However, the ordinary tool of construction applied by this Court is that "[i]n the absence of such a definition [in the statute], we construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 114 S.Ct. 996, 1001 (1994). *See also Smith v. United States*, 113 S.Ct. 2050, 2054 (1993).

The ordinary meaning of "appeal" in this context is given in *Black's Law Dictionary* (6th ed. 1990) (citations omitted):

> Resort to a superior (i.e. appellate) court to review the decision of an inferior (i.e. trial) court or administrative agency. A complaint to a higher tribunal of an error or injustice committed by a lower tribunal, in which the error or injustice is sought to be corrected or reversed. . . . There are two stages of appeal in the federal and many state court systems; to wit, appeal from trial court to intermediate appellate court and then to Supreme Court.

Id. at 96.[4] In fact, the Solicitor General's technical distinction conflicts directly with the ordinary meaning of "appeal," for *Black's* specifies that "an appeal may be as of right (e.g. from trial court to intermediate appellate court) or only at the discretion of the appellate court (e.g. by writ of certiorari to U.S. Supreme Court)." *Id.* at 96.[5] Thus, in common parlance, even among lawyers, the term "appeal" is used to denote both mandatory and discretionary procedures for seeking review of lower court decisions.

The term "appeal" and its derivatives are routinely used in this normal sense both in the Constitution and in relevant statutes. Article III, Section 2 of the Constitution vests only two kinds of jurisdiction in this Court, "original Jurisdiction" and "appellate Jurisdiction"; discretionary review of lower court decisions on writ of certiorari is thus part of this Court's "appellate" jurisdiction. In 28 U.S.C. § 594(a)(3), a provision of the recently expired Ethics in Government Act of 1978, Congress authorized an independent counsel to "(3) appeal[] any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity." Congress used this language, similar to that in 2 U.S.C. § 437d (a)(6), with the specific intent that "the authority given

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[4] *See also, e.g., Random House Dictionary of the English Language (Unabridged)* 72 (1983) ("*Law.* a. an application or proceeding for review by a higher tribunal"); *American Heritage Dictionary of the English Language (New College Edition)* 62 (1976) ("*Law. a.* The transfer of a case from a lower to a higher court for a new hearing").

[5] "Writ of certiorari" is similarly defined as "[a]n order by the appellate court which is used by that court when it has discretion on whether or not to hear an appeal from a lower court." *Black's Law Dictionary* at 1609.

in paragraph (3) to appeal any decision of a court includes taking an appeal to the Supreme Court without the permission of the Solicitor General," S. Rep. No. 95-170, 95th Cong., 1st Sess. 67 (1977).[6] Even 28 U.S.C. § 518(a), the basis for the Solicitor General's own litigating authority, does not mention petitions for certiorari but speaks generically, like the Constitution, of "suits and appeals." Since the Commission's construction of section 437d(a)(6) is the one that gives effect to the ordinary meaning of the statutory terms, it should receive the usual deference from this Court. *See* p. 8, *supra*.

The structure of the Act as a whole confirms that Congress intended the ordinary meaning of the words it used in section 437d(a)(6). First, the overall structure of the Act evidences Congress's particular concern about ensuring nonpartisan enforcement of the FECA by insulating the Commission from control by the President. Congress established the Commission in 1974 as a nonpartisan agency of six voting Commissioners, no more than three of whom could be of the same political party and only two of whom were to be appointed by the President. By requiring a majority vote of the Commissioners to authorize enforcement actions, Congress thus ensured that the Commission would be institutionally incapable of acting, or being used, in a partisan manner. *See generally, FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. at 37.[7] Congress also provided for congressional, rather

[6] It is noteworthy that the independent counsel, like the Commission, was established in response to Watergate as a remedy for the inherent conflict of interest in the Justice Department when activities of the President and his associates are at issue. *See* S. Rep. No. 95-170, at 5-7.

[7] *See* H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 140 (1974) (supp. views of Rep. Frenzel) ("The failure of the Justice Department to prosecute in 1972 is widely known. No administration or enforcement agency that is in any manner politically encumbered has ever done an adequate, consistent job in administering and enforcing election law").

than presidential, review of the Commission's proposed regulations, 2 U.S.C. § 438(d), gave the Commission authority to submit its own budget to Congress without presidential approval, 2 U.S.C. § 437d(d)(1), and precluded the President from controlling the Commission's submissions to Congress. 2 U.S.C. § 437d(d)(2).[8] In 1979, Congress exempted the Commission from the senior executive service program because the Commission "is a bipartisan agency, and should have a personnel policy free of involvement by the executive branch." 125 Cong. Rec. 36,754 (1979) (statement of Sen. Pell). *See also* 125 Cong. Rec. 37,197 (1979) (statement of Rep. Thompson). This comprehensive congressional plan to insulate the enforcement of the Act from partisan influence clearly supports giving effect to the text of section 437d(a)(6) by recognizing the Commission's authority to control its litigation at all judicial levels, independent of the Department of Justice.

More specifically, at the same time Congress enacted section 437d(a)(6), it also enacted 2 U.S.C. § 437h. That unusual provision authorizes "[t]he Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President" to "institute such actions . . . as may be appropriate to construe the constitutionality of any provision of this Act," and requires the district court to "certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." As originally enacted, section

[8] This Court found the restrictions on the President's appointment of voting Commissioners invalid in *Buckley v. Valeo*, 424 U.S. at 118-141, and Congress thereafter re-established the Commission with all voting members appointed by the President, 2 U.S.C. § 437c(a)(1), but retained all the rest of these safeguards. "[E]lection campaigns are the central expression of this country's democratic ideal. It is therefore essential in this sensitive area that the system of administration and enforcement enacted into law does not provide room for partisan misuse. . . ." H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 3 (1976).

437h included another subsection providing that "any decision on a matter certified [under section 437h] shall be reviewable by appeal directly to the Supreme Court of the United States." 2 U.S.C. § 437h(b) (1970 ed. Supp. IV). Congress specifically authorized the Commission, but not the Justice Department, to litigate cases under section 437h, and even the Solicitor General's narrowly technical construction of the term "appeal" in section 437d(a)(6) supports congressional authorization of the Commission to conduct appeals of section 437h cases to this Court. *See also* pp. 23-24, *infra*.

In 1988, Congress repealed the part of section 437h authorizing mandatory appeals to this Court, so that such cases are now reviewable only under the discretionary certiorari procedure. Pub. L. No. 100-352, § 6(a), 102 Stat. 662, 663 (1988). The structure of the amended statute bolsters the conclusion, supported by the ordinary meaning of its language, that section 437d(a)(6) authorizes the Commission to litigate cases on petition for certiorari. After the 1988 amendment, section 437h still specifies that the Commission is the only governmental entity eligible to invoke its procedures, and it still provides that the *en banc* court of appeals is to be the *initial* adjudicator, so that the *only* appellate review possible in such cases is in this Court on writ of certiorari. In these circumstances, section 437d(a)(6) has to be construed to include petitions for certiorari if effect is to be given to its language authorizing the Commission to "appeal *any* civil action in the name of the Commission" (emphasis added).[9]

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[9] Repeal of the mandatory appeal provision of section 437h was part of an omnibus statute to reduce the burden on this Court by curtailing mandatory appeals and providing broader discretion in selecting cases to review. *See* S. Rep. No. 100-300, 100th Cong., 2d Sess. 1-3, 6 (1988). Nothing in the language or legislative history of this statute remotely suggests that Congress contemplated transferring litigation authority from the Commission (or any other agency) to the Solicitor General.

B. The Legislative History of Section 437d(a)(6)

Justice Holmes' venerable dictum that "a page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), has particular force here, for the Commission was fashioned as a direct response to the trauma of Watergate, still considered "the most infamous political scandal in our nation's history." *United States v. Wood*, 6 F.3d 692, 696 (10th Cir. 1993). The lengthy hearings of the Senate Watergate Committee disclosed widespread politicization of government operations to serve the re-election efforts of President Nixon, including official actions by the Attorney General. *See Final Report of the Select Committee on Presidential Campaign Activities*, S. Rep. No. 93-981, 93d Cong., 2d Sess. 127-29, 145-47, 699-729, 980-98, 1184-87 (1974). The Watergate Committee concluded that "[p]robably the most significant reform that could emerge from the Watergate scandal is the creation of an independent nonpartisan agency to supervise the enforcement of the laws relating to the conduct of elections." *Id.* at 564.

The language in section 437d(a)(6) originated in S. 372, which was passed by the Senate in 1973, in the midst of the Watergate investigation, but was never taken up by the House. S. 372 was reported by the Commerce Committee with language creating an independent Federal Election Commission to "allay any misgivings that campaign laws are not being uniformly [sic] and consistently enforced," S. Rep. No. 93-170, 93d Cong., 1st Sess. 15 (1973), and was referred for hearings before the Committee on Rules and Administration. Section 309(a)(7) of the bill would have granted the Commission the power

> to initiate (through civil proceedings for injunctive relief and through presentations to Federal grand juries), prosecute, defend, or appeal any court action in the name of the Commission for the purpose of

> enforcing the provisions of title I and this title through its General Counsel. . . .

S. Rep. No. 93-170, at 35.[10]

During the hearings before the Rules and Administration Committee, witness after witness stressed the importance not only of establishing an independent agency, but of removing the opportunity and appearance of partisan enforcement of the campaign finance laws, to serve the interest of the President and his party, by taking it out of the hands of the Justice Department. As Senator Stevenson put it:

> At present the Justice Department is charged with responsibility for prosecuting campaign financing abuses and for enforcing election laws.
>
> This system has one overwhelming defect: the temptation to enforce the law in partisan and discriminatory ways, ignoring violations by one's own party members and either aggressively pursuing violations by the opposition, or holding back for fear that prosecutions will look politically motivated. Even if the Justice Department were capable of absolutely evenhanded enforcement, its every action would be open to charges and insinuations of partisanship.
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> This is a clear argument for insulating the enforcement of election laws from partisan influences. Our bill, if enacted, would achieve that end.

1973 Hearings at 186.[11]

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[10] This language appears to have been taken from S. 1094, which had been introduced by Senators Scott, Stevenson, and Mathias. *See Federal Election Reform, 1973: Hearings before the Subcommittee on Privileges and Elections and the Committee on Rules and Administration*, 93d Cong., 1st Sess. 108-114 (1973) (hereafter "*1973 Hearings*").

[11] *See also, e.g., 1973 Hearings* at 17 (Sen. Mathias) ("This amendment takes the enforcement of the election process out of the hands of the Department of Justice and thus out of the political arena."); *id.* at 160 (Sen. Cannon) ("Had that Federal Election Commission been in operation prior to the 1972 election, it is my judgment that that Commission . . . could very well have acted forcibly and effectively to reassure the public that our laws are being observed and enforced. It is not possible under the law we enacted."); *id.* at 177 (Sen. Bayh) ("I don't care whether it is a Republican administration or a Democratic administration, the temptation is going to be there in the Justice Department not to prosecute election violations against some of your own party faithful"); *id.* at 233 (Sen. Cannon) (independent commission with enforcement authority needed to avoid "a 'fox watching the henhouse' sort of situation").

The only opposition to removing enforcement of the FECA from the Justice Department came from the Justice Department itself. Assistant Attorney General Robert O. Dixon, Jr., raised two objections to the independent litigating authority to be given the Commission. He argued, first, that the bill's assignment of criminal prosecution authority to an independent agency would be unconstitutional and, second, that authorizing the Commission to appear on its own in the Supreme Court would be bad policy. *1973 Hearings* at 225-26.[12] When Dixon asked to submit a statement that had been prepared by the Solicitor General to oppose giving independent litigating authority in the Supreme Court to another agency, the request was granted without anyone's suggesting that S. 372 would not have such an effect. *Id.* at 226. The members of the Committee thus accepted Dixon's view of the bill's effect without question; Senator Pell responded that "[y]our statement was excellent and its points will be considered by this committee." *Id.* at 227. Senator Cannon pressed Dixon on his constitutional objection, but showed no interest in his policy objections to granting the Commission

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[12] "It should be noted, moreover, that the Commission's litigating authority would extend to the Supreme Court. This attempt to divest the Solicitor General of longstanding jurisdiction to handle Supreme Court litigation on behalf of the United States would be contrary to the best interests of both the Federal Government as a major litigant before the Supreme Court, we feel, and of the Court itself." *1973 Hearings* at 226.

authority for Supreme Court litigation. *1973 Hearings* at 233.[13]

The Committee reported S. 372 with no changes to section 309(a)(7) in response to Dixon's objections, finding that "[a] separate entity, not so closely aligned with the Chief Executive of the United States, or with the Congress, and charged with the duty of carrying out the responsibilities given it by law can be expected to carry out those obligations quickly, efficiently, and impartially." S. Rep. No. 93-310, 93d Cong., 1st Sess. 4 (1973).[14]

During the floor debate, the prophylactic purpose of this provision to establish the Commission's complete independence from the Justice Department in enforcing the FECA was repeatedly emphasized. In particular, Senator Bayh engaged Senator Cannon in a colloquy to clarify that this was intended to be an exception to the Attorney General's authority under 28 U.S.C. § 516 to control the litigation of the United States, 119 Cong. Rec. 26,590-91 (1973),[15] and there was a sharp exchange over Senator

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[13] The Solicitor General (Br. 11 n.8) dismisses Dixon's testimony because he misquoted three words of the provision. Initially, the Solicitor General does not explain why the phrase actually used in the bill, "appeal any court action," would be any less sweeping than Dixon's version. In any event, the significance of this episode lies not in the merits of Dixon's statutory analysis, but in the Committee's acceptance of his assertion that this was the intent of the bill. It is also noteworthy that, in contrast to the Solicitor General's current argument, even under Dixon's version of the bill's wording the Justice Department's position was that the Commission would be authorized to conduct its own Supreme Court litigation by a provision that explicitly mentioned neither the Supreme Court nor petitions for certiorari.

[14] The Committee renumbered this provision as section 309(a)(6) and expanded the Commission's enforcement authority to include five pre-existing sections of Title 18 relating to federal elections. S. Rep. No. 93-310 at 32.

[15] "We all know, whether it might be as to one party or another, that we can see the possible reluctance of bringing before the bar of justice those whose beneficence happened to help the party which

McClellan's objection to depriving the Attorney General of the usual authority to conduct law enforcement litigation. 119 Cong. Rec. 26,608-10 (1973).[16] The bill was then adopted by a vote of 82-8. 119 Cong. Rec. at 26,613.

The House did not consider S. 372, and a few months later the provisions from that bill establishing the Federal Election Commission were incorporated without relevant change into S. 3044, which was introduced on February 21, 1974. *See* S. Rep. No. 93-689, 93d Cong., 2d Sess. 2, 4 (1974). The final legislation enacted in 1974 created an independent Federal Election Commission largely as described in the language of this Senate bill. In particular, the wording of section 309(a)(6) from the 1973 Senate bill defining the Commission's independent litigating authority was retained for civil actions, and the Justice Department's enforcement authority was thus limited to criminal prosecutions.[17]

In sum, the statute enacted in 1974 transferred all civil litigation authority under the FECA from the Justice

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controlled the Department of Justice at that time." 119 Cong. Rec. at 26,491 (Sen. Bayh).

[16] "Because the office of Attorney General is in fact a political office, because so many complaints have been made, and because not a sin[g]le action has ever been brought or taken, there has been a tremendous amount of feeling that this power should be reposed in the Commission. . . . It is true that we are in a way taking some power away from the Attorney General's office. But the power that the Attorney General's office enjoys was delegated by Congress; and Congress can modify it, improve it, add to it, and subtract from it. In this particular instance, we have subtracted from it." 119 Cong. Rec. at 26,610 (Sen. Pastore).

[17] The statute as enacted authorized the Commission to "appeal any civil action," instead of the authorization in S. 372 to "appeal any court action," and the other references to criminal procedures were omitted from it. The provision as enacted also expanded "through civil proceedings for injunctive relief" to include "through civil proceedings for injunctive, declaratory, or other appropriate relief," and it was expanded to include civil litigation under the presidential public financing statutes codified in Title 26. 2 U.S.C. § 437d(a)(6) (1970 ed. Supp. IV).

Department to the Commission. Complete independent civil litigating authority at all levels of the judiciary was authorized, as originally proposed in the 1973 bill, in order to insulate enforcement of the Act from partisan influence. This legislative history confirms that Congress intended just what the normal meaning of the text of section 437d(a)(6) indicates—that the Commission has complete independent authority to conduct all aspects of its civil litigation under the FECA without supervision from the Department of Justice.

II. THE GRANT OF INDEPENDENT LITIGATING AUTHORITY IN 2 U.S.C. § 437d(a)(6) IS NOT LIMITED BY THE SEPARATE GRANT OF LITIGATING AUTHORITY IN TITLE 26

A. The Separate Provisions in Title 26 Were Not Designed to Limit the Scope of 2 U.S.C. § 437d(a)(6)

Lacking support in the language, structure, or legislative history of the FECA, the Solicitor General's argument rests in the end upon a superficial application of the maxim *expressio unius est exclusio alterius*. The presidential public financing statutes, 26 U.S.C. §§ 9010(d), 9040(d), also grant the Commission independent litigating authority, and both of those provisions explicitly mention petitioning this Court for review. From this, the Solicitor General argues that Congress's failure to specify petitioning for certiorari in 2 U.S.C. § 437d(a)(6) indicates a congressional intention to limit the Commission's authority under the FECA to appeals of right.

The *expressio unius* maxim " 'is a questionable one in light of the dubious reliability of inferring specific intent from silence.' " *Pauley v. BethEnergy Mines, Inc.*, 111 S.Ct. 2524, 2537 (1991) (quoting Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2109 n.182 (1990)).[18] Even if it were fully applicable

[18] Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), statutory silence requires deference to an agency's construction of a statute it administers. Accordingly, courts normally should "defer to [an agency's] refusal to read the Act in the manner suggested by the *expressio* canon if its interpretation is otherwise reasonable." *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991).

here, this maxim could not overcome the direct evidence discussed above that the ordinary meaning of the language in section 437d(a)(6) includes petitions for certiorari, that Congress has used similar language elsewhere to authorize independent appeals to this Court, and that the structure of the Act is inconsistent with construing section 437d(a)(6) not to authorize petitions for certiorari. *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983); *American Trucking Ass'ns v. United States*, 344 U.S. 298, 309-10 (1953).

In this case, however, the Solicitor General is comparing apples with oranges. The provisions he cites are from separate statutes codified in different Titles of the United States Code, they were drafted by different Congresses in different years, and they were originally written to apply to different agencies of the government. The provision codified at 26 U.S.C. § 9010(d) was part of the Presidential Election Campaign Fund Act enacted in 1971, before Watergate and the creation of the Federal Election Commission. Revenue Act of 1971, Pub. L. No. 92-178, title VIII, § 801, 85 Stat. 497, 570 (1971). That statute, which provided public financing of the general election campaign for President, was to be administered by the Comptroller General, and it was for him that section 9010(d) was drafted. As discussed *supra*, pp. 15-20, 2 U.S.C. § 437d(a)(6) was drafted in 1973, in the midst of the Watergate controversy, as part of a bill intended to restore public confidence in the evenhanded enforcement of the FECA by transferring this function from the Justice Department to a nonpartisan, independent commission. The 1973 bill would not have assigned the Commission any responsibility with respect to the previously enacted Presidential Election Campaign Fund Act. Since this bill

had nothing to do with the presidential public financing statute administered by the Comptroller General, its drafters had no occasion to compare the language of these two provisions.

In 1974, when the bill establishing the Commission was finally enacted, Congress transferred administration of the presidential public financing statute to the Commission, in addition to the responsibility for enforcing the FECA's comprehensive regulation of the financing of both presidential and congressional election campaigns. However, Congress did not redraft the Presidential Election Campaign Fund Act to coordinate its choice of language with the new provisions of the FECA establishing the Commission. Instead, it simply replaced references to the Comptroller General in most of its provisions, including section 9010(d), with references to the Commission. Pub. L. No. 93-443, § 404(c), 88 Stat. 1292-93 (Oct. 15, 1974). The language of section 9010(d) was simply incorporated into section 9040(d) of the Presidential Primary Matching Payment Account Act, also enacted in 1974, *id.*, § 408(c), 88 Stat. 1302, and section 437d(a)(6) was expanded to cover both of the public financing statutes as well. Thus, the legislative history does not support the Solicitor General's assumption that, by transferring to the Commission the litigating authority previously assigned to the Comptroller General, Congress somehow intended to restrict the broad authority given the Commission in 2 U.S.C. § 437d (a)(6).

The Solicitor General notes (Br. 10) that there is one section of the FECA itself that also mentions certiorari: 2 U.S.C. § 437g(a)(9), which provides that a court of appeals judgment in litigation under section 437g "shall be final, subject to review by the Supreme Court . . . upon certiorari or certification as provided in" 28 U.S.C. § 1254. However, section 437g(a)(9) only defines the *procedure* for seeking review in this Court and does not address the question of litigating authority at all. This provision thus stands in contrast not with section 437d (a)(6), but with the mandatory appeal procedure originally included in section 437h. 2 U.S.C. § 437h(b) (1970 ed., Supp. IV). We have already shown, moreover, that the language of section 437d(a)(6) applies to both mandatory and discretionary procedures for seeking review. *See* pp. 10-12, *supra*. In fact, the language of section 437g(a)(9) could not have been designed to contrast with the language giving litigating authority to the Commission in section 437d(a)(6), for the language in section 437g(a)(9) was enacted as part of the 1971 version of the FECA, before the creation of an independent Federal Election Commission, when all of the enforcement litigation was supposed to be conducted by the Justice Department itself. Pub. L. No. 92-225, § 308(d)(4), 86 Stat. 18 (Feb. 7, 1972).

B. The Solicitor General's Construction Would Create an Unworkable Statutory Scheme

The Solicitor General's *expressio unius* theory would create an anomalous patchwork of litigating authority that could not have been intended by Congress.[19] For example, the Commission has overlapping authority to pursue injunctive relief for violations of the presidential public financing statutes under both Title 2 and Title 26. *See* 2 U.S.C. §§ 437d(a)(6), 437g(a)(6); 26 U.S.C. §§ 9010 (c), 9011(b), 9040(c). Under the Solicitor General's theory, the Commission's authority to control such litigation at the Supreme Court level would depend entirely upon the fortuity of which of these available options the Commission chooses to invoke. If the Commission elects to rely on *both* of these complementary statutes as author-

[19] " '[The *expressio unius* maxim] is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The 'exclusio' is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application . . . leads to inconsistency or injustice.' " *Ford v. United States*, 273 U.S. 593, 612 (1927) (citation omitted). *See also Pauley v. BethEnergy Mines*, 111 S.Ct. at 2537 (rejecting " 'absurd or futile results' " (citation omitted)).

ity for an injunction in such a case, the Solicitor General's theory would result in a redundant and conflicting assignment of authority to both agencies at once.

A similar conflict of authority would result within the FECA itself. As this Court pointed out in *California Medical Ass'n v. FEC*, 453 U.S. 182, 187-89 (1981), the FECA "provides two routes by which questions involving its constitutionality may reach this Court." Such questions can be raised either as an affirmative defense in an enforcement suit brought by the Commission pursuant to 2 U.S.C. § 437g, over which the Solicitor General claims authority at the Supreme Court level, or in a separate action for declaratory judgment under the special procedures of 2 U.S.C. § 437h, which was assigned by Congress in 1974 to the Commission's control at all judicial levels even under the Solicitor General's narrow construction of the language of section 437d(a)(6) (see pp. 13-14, *supra*). The Solicitor General's theory thus attributes to Congress a peculiar scheme whereby the fortuity of which procedure is invoked determines whether the Commission or the Solicitor General controls litigation of the same issue in the Supreme Court. This result is especially anomalous in light of the heavily fact-specific nature of a section 437g proceeding compared with the focus on broad constitutional questions in a section 437h proceeding. Worse, this Court held in *California Medical Ass'n*, 453 U.S. at 189-92, that defendants in enforcement suits filed under section 437g can invoke section 437h to divert litigation of their constitutional defenses into that provision's expedited procedures. The Solicitor General's theory would, therefore, place in the hands of defendants the means to determine who will represent the government, and thus determine its positions and arguments, when such constitutional defenses reach the Supreme Court.[20] Such a scheme is too bizarre to attribute to Congress.

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[20] In fact, the constitutional issues in this case could just as easily have been certified to the court of appeals under the procedures of section 437h, at the option either of the Commission or of the individual defendant.

In sum, the language, structure, and legislative history of the FECA all support continuing to recognize the Commission's statutory authority to litigate cases under that Act in the Supreme Court without authorization from the Justice Department, as it has done for almost two decades. The Solicitor General acknowledges (Br. 12) that such independent litigating authority is supported by substantial policy considerations unique to this agency, considerations that we have shown above to have been the motivating concerns of Congress in removing this litigation from the Department of Justice. The overlapping and conflicting litigating authority that would result from the Solicitor General's theory actually runs counter to the usual justification for centralizing control of Supreme Court litigation in the Solicitor General, namely, ensuring "that the United States usually should speak with one voice before this Court." *Providence Journal*, 485 U.S. at 706.[21]

The Commission's construction of section 437d(a)(6) as authorizing the independent litigation in this Court that the Commission has been conducting for almost two decades suffers from none of these defects. Accordingly, there being no substantial basis for refusing to accept the Commission's longstanding construction of the statute it administers, the Court should construe section 437d(a)(6) to authorize the Commission to continue conducting litigation in this Court, under Title 2 as well as Title 26, without the supervision of the Department of Justice.

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[21] The Commission's authority to file petitions for certiorari in cases under Title 2 has not resulted in an undue burden on this Court. This case is only the eighth time in its 19-year history that the Commission has petitioned for certiorari in a case under Title 2. The Commission has also filed one mandatory appeal in a Title 2 case, and one petition for certiorari and two mandatory appeals in cases under Title 26, all of which would be within its authority even under the Solicitor General's construction.

CONCLUSION

The Court should rule that the Federal Election Commission has statutory authority to litigate this case in this Court without the authorization of the Solicitor General, and proceed to consider the petition for certiorari filed by the Commission.

Respectfully submitted,

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May 31, 1994

APPENDICES

APPENDIX A

2 U.S.C. § 437h (1970 ed. Supp. IV):

§ 437h. Judicial review.

(a) Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc.

The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18. The district court immediately shall certify all questions of constitutionality of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18, to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) Appeal to Supreme Court; time for appeal.

Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) Advancement on appellate docket and expedited disposition of certified questions.

It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

APPENDIX B

FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

May 25, 1989

Thomas Merrill
Deputy Solicitor General
Room 5137
Department of Justice
10th & Constitution Avenues, N.W.
Washington, D.C. 20530

RE: *Austin, et al. v. Michigan State Chamber of Commerce,* No. 88-1569 (Supreme Court)

Dear Mr. Merrill:

Pursuant to your suggestion in our telephone conversation, I have reviewed with the Commission's General Counsel your concerns regarding the Commission's authority to represent itself in this case in the role of an *amicus curiae.* I am writing to explain why we believe the Commission has the authority to do so, and to inform you that we do intend to file an *amicus* brief on behalf of the Commission in this case by the current due date of June 29.

As you are aware, Congress expressly authorized the Commission to represent itself in the federal courts in all civil litigation involving the Act. 2 U.S.C. § 437c(f)(4). Congress did not, however, limit the Commission's litigating authority to matters arising from the Commission's administrative activity. In addition to the authority to initiate, defend and appeal civil actions to enforce the Act, 2 U.S.C. § 437d(6), in 2 U.S.C. § 437h and 26 U.S.C. § 9011(b) Congress named the Commission, rather than the Department of Justice, to litigate questions of the constitutionality of the Act under the special procedures it had devised for these important issues.

The Commission has consistently fulfilled this responsibility to defend the constitutionality of the Act and the public financing statutes, in cases in which the Commission was a named defendant under the special provisions of sections 437h and 9011(b), *e.g. California Medical Association v. FEC,* 453 U.S. 182 (1981); *Republican National Committee v. FEC,* 487 F. Supp. 280 (S.D.N.Y. 1979) (three-judge court); 616 F.2d 1 (2d Cir. 1979) (en banc), *aff'd mem.,* 445 U.S. 955 (1980); *International Association of Machinists v. FEC,* 678 F.2d 1092 (D.C. Cir. 1982) (en banc), *aff'd mem.,* 459 U.S. 983 (1982); *Bread Political Action Committee v. FEC,* 455 U.S. 577 (1982); *Athens Lumber Company, Inc. v. FEC,* 689 F.2d 1006 (11th Cir. 1982), 718 F.2d 363 (11th Cir. 1983) (en banc), *cert. denied,* 465 U.S. 1092 (1984), and in cases in which constitutional defenses were raised in enforcement actions filed under sections 437g and 437d(b), *e.g., National Right to Work Committee v. FEC,* 459 U.S. 197 (1982); *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986); *FEC v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980) (en banc); *REC v. Hall-Tyner Election Campaign Committee,* 678 F.2d 416 (2d Cir. 1982), *cert. denied,* 459 U.S. 1145 (1983); *FEC v. Lance,* 617 F.2d 365 (5th Cir. 1980), *aff'd,* 453 F.2d 1132 (5th Cir.) (en banc), *cert. denied,* 453 U.S. 917 (1981); *FEC v. Furgatch,* 807 F.2d 857 (9th Cir.) *cert. denied,* 108 S.Ct. 151 (1987). In addition, the Commission has intervened in two cases being litigated by others under 26 U.S.C. § 9011(b) to defend the constitutionality of the public financing statutes. *See, Common Cause v. Schmitt,* 512 F.Supp. 489 (D.D.C. 1980) (three judge court), *aff'd by an equally divided Court,* 455 U.S. 129 (1981); *FEC v. National Conservative Political Action Committee,* 470 U.S. 480 (1985). Finally, the Commission has appeared before as an *amicus* in a case challenging the constitutionality of a state statute containing provisions that appeared to parallel those

of the Act. *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978).

Independent litigating authority is usually granted to an agency because of its expertise in a specialized area of law. The Commission's particularly broad independence also derives from the fact that Congress established it as a uniquely bipartisan agency—a six member body with no more than three members belonging to any one political party. 2 U.S.C. § 437c(a)(1). It was thought that such a body was necessary to ensure that the resolution of sensitive election law issues could not be tainted by partisan bias. In contrast, as a political agency subject to the control of the incumbent President, the Department of Justice has an inherent conflict of interest with respect to what are often highly partisan issues in the area of campaign finance law. This concern is not merely an abstract one. We have often engaged in litigation against members or committees of a sitting President's party, and have several times litigated against a sitting President's own campaign committee. *See In re Carter-Mondale Reelection Committee, Inc.,* 642 F.2d 538 (D.C. Cir. 1980); *Reagan For President Committee v. FEC,* 734 F.2d 1569 (D.C.Cir. 1984); *Reagan-Bush Committee v. FEC,* 525 F.Supp. 1330 (D.D.C. 1981). Moreover, in several cases the Department of Justice has actually litigated against the Commission, twice seeking to have portions of the Act defended by the Commission declared unconstitutional. *See Buckley v. Valeo,* 424 U.S. 1 (1976); *Clark v. Valeo,* 559 F.2d 642 (D.C. Cir.) (en banc), *aff'd mem. sub nom. Clark v. Kimmit,* 431 U.S. 950 (1977); *Galliano v. United States Postal Service,* 836 F.2d 1362 (D.C.Cir. 1988).

We see no reason why Congress' choice of the Commission as the primary agency to defend the constitutionality of the Act, and the purposes served by that choice, would be inapplicable merely because the constitutional issue arises in a case reviewing a state statute modeled on the Act rather than a direct attack on the Act itself.

The Act's failure to address this situation explicitly does not, in our view, reflect a Congressional decision to deny the Commission authority to file an *amicus* brief in a case like this to apprise the Court of the Commission's view as to why the Act, and the state statute modeled on it, are constitutional. The provisions of the Act clearly reflect Congress's intent to grant the Commission independent authority to conduct every sort of civil litigation regarding the campaign finance laws that it anticipated would arise; if the role of an *amicus* in a case like this one had been discussed, there is no reason to think Congress would have hesitated to assign it to the Commission as well.

It is noteworthy that, up to now, the Department of Justice has consistently supported the Commission's independence in litigating the constitutionality of the Act in all types of cases. In cases filed under section 437h, where the Attorney General as well as the Commission has been named as a respondent, the Department has usually moved to have the Attorney General dismissed as a party on the ground that the Commission, rather than the Attorney General, was chosen by Congress to defend the constitutionality of the Act. When such motions have failed, the Department has usually filed briefs simply endorsing the arguments made by the Commission. In *Goland v. United States* (C.D.Cal. No. CV-89-1480-RSWL), a criminal defendant indicted for, *inter alia,* violations of the Act, filed suit against the United States under section 437h to challenge the constitutionality of the provisions of the Act relied upon in the indictment. The Department requested the Commission to intervene as a defendant to take the lead in defending the constitutionality of the Act in that case, and to file an *amicus* brief in the accompanying criminal case to oppose the defendants' motion to dismiss the indictment on the same constitutional grounds. (It should be noted in this regard that the Act says nothing explicit about the Commission's authority to file *amicus* briefs in any court in any type of

case, yet the Commission has done so recently not only in *Goland,* but at the request of the court in *Galliano v. United States Postal Service,* 836 F.2d 1362 (D.C. Cir. 1988), in which the court essentially adopted the position advanced in the Commission's brief.)

Most importantly, however, is the fact that in *Bellotti* we filed, and the Supreme Court accepted, an *amicus* brief in circumstances similar to this case, without the participation or authorization of the Solicitor General. Indeed, our records reflect that in 1977 your office agreed orally with the Commission's position that the Commission was entitled to file an *amicus* brief in the Supreme Court in the *Bellotti* case on its own authority.

Finally, we believe that *United States v. Providence Journal,* 108 S.Ct. 1502 (1988), is distinguishable from this case on a number of grounds. The most important distinctions are that the Commission is appearing only as an *amicus* rather than as a party, and that the Commission, unlike the special prosecutor appointed by the district court in *Providence Journal,* has been granted by statute independent authority to litigate in the Supreme Court. The Supreme Court accepted our *amicus* brief in the jurisdictional phase of this case, and no party objected to our filing it. It therefore appears doubtful that any objection will be raised to our *amicus* brief on the merits by the Court or the parties to the case.

I hope this letter answers your concerns. If you have any further questions or comments, please feel free to call.

Sincerely,

/s/ Richard B. Bader
RICHARD B. BADER
Associate General Counsel

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(4)

No. 93-1151

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER

v.

NRA POLITICAL VICTORY FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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19 pp

QUESTION PRESENTED

This brief addresses the following question:

Whether the Federal Election Commission has statutory authority to represent itself in this case in this Court.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order of March 21, 1994, inviting the United States to address the question whether the Federal Election Commission has statutory authority to represent itself in this case in this Court. The United States has a substantial interest in the proper interpretation and application of 28 U.S.C. 518(a), which authorizes the Solicitor General to conduct Supreme Court litigation on behalf of the government, as well as in the proper interpretation of any statute vesting independent litigating authority in an agency of the United States.

STATEMENT

Petitioner Federal Election Commission (Commission or FEC) brought this civil enforcement action pursuant to 2 U.S.C. 437g(a)(6)(A). The FEC alleged that a transfer of funds from respondent National Rifle Association Institute for Legislative Action to its political action committee, respondent NRA Political Victory Fund, was a "contribution" prohibited by the Federal Election Campaign Act (FECA or Act), 2 U.S.C. 431 *et seq.* Pet. App. 2a-3a. The Commission sought declaratory and injunctive relief and civil penalties against the Institute for Legislative Action, the Political Victory Fund, and the Fund's treasurer, respondent Grant A. Wills. *Id.* at 3a.

Respondents contended that the statute establishing the Commission violates constitutional separation of powers principles in three respects. First, respondents argued that the Act impermissibly restricts the President's nomination power by requiring that no more than three (of the six) members of the Commission can be affiliated with the same political party. See 2 U.S.C. 437c(a)(1). Second, they asserted that the Commission's civil enforcement powers encroach on the President's authority to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3. Third, they contended that by placing the Secretary of the United States Senate and the Clerk of the United States House of Representatives on the Commission as *ex officio* members, see 2 U.S.C. 437c(a)(1), Congress has exceeded its authority under Article I. Pet. App. 6a. The district court rejected these arguments on standing grounds, concluding that respondents could not establish that they had been harmed by the alleged constitutional violations. *Id.* at 24a-27a. The district court agreed with the Commission on the merits of the enforcement action;

the court awarded declaratory and injunctive relief and assessed a financial penalty of $40,000. *Id.* at 27a-28a, 29a-30a, 31a-34a, 35a.

The United States Court of Appeals for the District of Columbia Circuit reversed. Pet. App. 1a-18a. The court of appeals concluded that respondents had standing to raise two of their constitutional claims, *id.* at 6a-11a,[1] and held that the *ex officio* membership of the Secretary and the Clerk violated separation of powers principles. *Id.* at 13a-16a. The court concluded that the only conceivable purpose of *ex officio* membership was to influence the Commission, albeit solely through an informational or advisory role, and that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution." *Id.* at 15a (citing *Metropolitan Washington Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991)). The court determined that the offending portion of the FECA was severable, Pet. App. 16a-17a, but held that the *de facto* officer doctrine could not be used to redeem the Commission's actions in this particular enforcement proceeding. *Id.* at 17a-18a.

The Commission, in its own name, filed a timely petition for a writ of certiorari. The Commission neither sought nor obtained the authorization of the Solicitor General prior to filing its petition. Respondents filed a brief in opposition, and the Commission submitted a reply. By order dated March 21, 1994, this Court invited the United States to file a brief addressing the question "[w]hether the Federal Election Com-

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[1] The panel concluded, however, that respondents' challenge to the statutory restrictions on party affiliation was not justiciable. Pet. App. 8a-11a.

mission has statutory authority to represent itself in this case in this Court."

DISCUSSION

In our view, the FEC lacks statutory authority to represent itself in this case in this Court. Pursuant to 28 U.S.C. 518(a) and implementing regulations, however, the Solicitor General has authorized the petition for a writ of certiorari filed by the Commission. The petition should therefore be considered by this Court.

1. The Federal Election Commission is an independent agency established by Congress to "administer, seek to obtain compliance with, and formulate policy" with respect to the Federal Election Campaign Act of 1971 (FECA), as amended, and chapters 95 and 96 of Title 26 of the United States Code. 2 U.S.C. 437c(b)(1). The Commission has "exclusive jurisdiction with respect to the civil enforcement of such provisions." *Ibid.*; see *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 485, 489 (1985); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 198 n.2 (1982).

In addition to extensive recordkeeping, disclosure, investigative, rulemaking, and adjudicative functions, see 2 U.S.C. 437d(a), the Commission is vested with enforcement power that is "both direct and wide ranging" and substantially independent of the Attorney General and the Department of Justice. See *Buckley* v. *Valeo*, 424 U.S. 1, 111-113 (1976) (per curiam). If informal measures, see 2 U.S.C. 437g(a)(4), fail to prevent or correct violations of the FECA, the Commission is entitled to institute a civil action for injunctive or other appropriate relief. See 2 U.S.C. 437g(a)(6)(A). The Commission is also entitled to institute actions to implement or construe the provisions of chapter 95 of Title 26, which governs the administration of funds for Presidential election campaigns and national party conventions, see 26 U.S.C. 9011(b); to implement the provisions of chapter 96 of Title 26, which governs the payment of matching funds for Presidential primary campaigns, see 26 U.S.C. 9040(c); and to seek repayment from Presidential candidates of funds that it determines are owed to the Secretary of the Treasury under chapter 95 or chapter 96. See 26 U.S.C. 9010(b), 9040(b). The decision whether to undertake these civil enforcement actions rests solely with the Commission.[2]

The Commission's independent litigating authority is described in two separate statutory provisions. The more general provision, 2 U.S.C. 437d(a)(6), applies to actions under both the Federal Election Campaign Act and chapters 95 and 96 of Title 26. It provides that

> [t]he Commission has the power * * * to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of [the FECA] and chapter 95 and chapter 96 of title 26, through its general counsel.

The second provision, which appears in 26 U.S.C. 9010(d) and 9040(d), applies only to actions under chapters 95 and 96 of Title 26. It provides that:

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[2] With regard to criminal enforcement, the Commission may refer to the Attorney General for possible prosecution any knowing and willful violation of the Act, or of chapter 95 or 96 of Title 26, if it has probable cause to believe that such a violation has occurred or is about to occur. 2 U.S.C. 437g(a)(5)(C). The Attorney General is then obliged to report to the Commission any action taken with respect to the apparent violation. 2 U.S.C. 437g(c).

> [t]he Commission is authorized on behalf of the United States to appeal from, and *to petition the Supreme Court for certiorari to review*, judgments or decrees entered with respect to actions in which it appears pursuant to the authority provided in [26 U.S.C. 9010 or 9040]. (emphasis added)

The present civil enforcement action was brought pursuant to 2 U.S.C. 437g(a)(6)(A). In it the FEC sought to establish a violation of 2 U.S.C. 441b(a), a provision of the FECA. Under 2 U.S.C. 437d(a)(6), the Commission clearly possessed independent litigating authority to "initiate" and "appeal" this action. Although the conduct of litigation on behalf of the United States and its agencies is generally subject to the control of the Attorney General under 28 U.S.C. 516 and 519, the Commission's independent conduct of the litigation in the district court and the court of appeals was therefore proper because "authorized by law" within the meaning of those Sections.[3] See *United States* v. *Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988).

2. The question in this case, however, concerns the conduct of litigation in the Supreme Court. As a general matter, 28 U.S.C. 518(a) provides that

> [e]xcept when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested.

By regulation, the Attorney General has delegated her authority to the Solicitor General. See 28 C.F.R. 0.20.

[3] Under Sections 516 and 519, the conduct of litigation on behalf of the United States and its agencies is subject to the control of the Attorney General "[e]xcept as otherwise authorized by law."

Thus, if a case is one "in which the United States is interested," 28 U.S.C. 518(a), "it must be conducted and argued in [the Supreme Court] by the Solicitor General or his designee." *Providence Journal*, 485 U.S. at 700; see also *United States* v. *Winston*, 170 U.S. 522, 524-525 (1898); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458 (1869).[4]

This case is plainly one in which the United States "is interested." In *Providence Journal*, this Court held that this phrase embraces even those cases involving the interests of the Judicial Branch, since at bottom "the three branches are but 'co-ordinate parts of one government.'" 485 U.S. at 701 (quoting *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928)). Nothing in this Court's decisions suggests that cases involving independent administrative agencies such as the Commission call for a different conclusion.

Congress may exempt a class of litigation "from the otherwise blanket coverage" of Section 518, but "any

[4] The Solicitor General may authorize an independent agency to represent itself in this Court in a particular case even if that agency lacks independent statutory authority to proceed on its own behalf. See 28 C.F.R. 0.20(a); cf. *Providence Journal*, 485 U.S. at 698 (noting that the Solicitor General had declined to authorize the filing of a petition for certiorari). Indeed, the Solicitor General sometimes deems it appropriate to authorize federal agencies to file briefs in this Court on their own behalf asserting positions contrary to those of the United States. See, *e.g.*, *Dirks* v. *Securities and Exchange Commission*, 463 U.S. 646, 648 n.* (1983) (Securities and Exchange Commission authorized by Solicitor General to file brief defending the judgment of the court of appeals, although Solicitor General filed a brief urging reversal); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 367 n.* (1973) (Federal Power Commission authorized by Solicitor General to file brief *amicus curiae* supporting position contrary to that asserted by the United States).

such alleged exception must be scrutinized and subjected to the ordinary tools of statutory construction to determine whether Congress intended to supersede § 518(a)." *Providence Journal*, 485 U.S. at 705 n.9. Alleged exceptions must also be measured against the traditional role of the Attorney General and the Solicitor General in controlling and conducting Supreme Court litigation on behalf of the United States and its agencies, a role that is critical to proper management of the vast amount of government litigation that may potentially be brought before this Court. See *id.* at 702 n.7, 706; *id.* at 709, 713-714 (Stevens, J., dissenting); cf. *The Gray Jacket*, 72 U.S. (5 Wall.) 370 (1866).[5]

Although the Commission has represented itself before this Court in the past,[6] review of the

[5] Statutory provisions conferring litigating authority on independent agencies vary substantially in their terms. On the one hand, before its expiration the Ethics in Government Act of 1978 authorized an independent counsel to initiate and conduct prosecutions "in any court of competent jurisdiction * * * in the name of the United States," 28 U.S.C. 594(a)(9)—a provision that this Court has characterized as "suggest[ing] [an] exception[] to the blanket coverage of § 518(a)." *Providence Journal*, 485 U.S. at 705 n.9. On the other hand, some agencies are expressly *denied* authority to litigate on their own behalf in this Court. See, *e.g.*, 5 U.S.C. 7105(h) (Federal Labor Relations Authority may conduct litigation through its own attorneys "[e]xcept as provided in section 518 of title 28, relating to litigation before the Supreme Court").

[6] Exclusive of cases brought under Title 26, see, *e.g.*, *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480 (1985), the Commission has represented itself in seven cases resulting in decisions on the merits since *Buckley* v. *Valeo*, *supra*. The Commission was the petitioner in *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981), involving the application of 2 U.S.C. 441a(d)(3), and *FEC* v. *National Right to Work Comm.*, 459 U.S. 197 (1982), which involved the interpretation of 2 U.S.C. 441b(b)(4)(c). The Commission was the appellant in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), in which this Court found 2 U.S.C. 441b unconstitutional as applied. The Commission was the appellee in *California Medical Ass'n* v. *FEC*, 453 U.S. 182 (1981), which upheld the constitutionality of certain campaign expenditure limitations imposed by 2 U.S.C. 431 *et seq.*, and *Bread Political Action Comm.* v. *FEC*, 455 U.S. 577 (1982), involving the application of 2 U.S.C. 437h(a). The Commission also participated as *amicus curiae* in *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), and *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990). None of those decisions addresses the question of the Commission's litigating authority under 2 U.S.C. 437d(a)(6). We are aware of no Department of Justice communications authorizing the Commission to represent itself in the Supreme Court in those cases.

Commission's statutory powers reveals that it lacks independent litigating authority to represent itself in the Supreme Court in this type of action, and that any authority must therefore be delegated by the Solicitor General under 28 U.S.C. 518(a) and implementing regulations. By its terms, the Commission's independent authority under 2 U.S.C. 437d(a)(6) is limited to "initiat[ing]," "defend[ing]," and "appeal[ing] any civil action in the name of the Commission." No mention is made of authority to file a petition for a writ of certiorari or otherwise to conduct litigation before the Supreme Court without the authorization of the Solicitor General. On its face, therefore, Section 437d(a)(6) does not provide the requisite "clear and manifest" evidence of an intent to displace the Solicitor General's authority over Supreme Court litigation on behalf of the federal government. See *Rodriguez* v. *United States*, 480 U.S. 522, 524 (1987) (per curiam) (internal quotation marks and citations omitted).

The failure of Section 437d(a)(6) to provide the Commission with independent litigating authority in

this Court is especially noteworthy in light of the fact that Congress explicitly provided just such independent authority to the Commission in actions concerning the financing of Presidential election campaigns brought under chapters 95 and 96 of Title 26. With respect to such actions, Congress provided that "[t]he Commission is authorized on behalf of the United States to appeal from, *and to petition the Supreme Court for certiorari to review*," judgments or decrees. 26 U.S.C. 9010(d), 9040(d) (emphasis added).[7] It is difficult to read these two provisions without concluding that Congress intended to restrict the Commission's independent authority in this Court to the Presidential election controversies for which Supreme Court litigation authority was expressly conferred.

The significance of the omission of any reference to Supreme Court litigation in Section 437d(a)(6) is also highlighted by 2 U.S.C. 437g(a)(9). That Section describes the decisions of courts of appeals in actions (such as the instant case) brought under 2 U.S.C. 437g as final "subject to review by the Supreme Court of the United States upon certiorari or certification as

[7] Section 9010(d) was first enacted in 1971. See Presidential Election Campaign Fund Act, Pub. L. No. 92-178, 85 Stat. 497, 569-570. The Federal Election Campaign Act Amendments of 1974 established the Federal Election Commission, see Pub. L. No. 93-443, § 208, 88 Stat. 1263, 1280, and enacted 2 U.S.C. 437d(a)(6), which governs the Commission's general litigation authority. See 88 Stat. 1282-1283. That statute also transferred to the Commission the functions previously performed by the Comptroller General under 26 U.S.C. 9010, see 88 Stat. 1293, and added Section 9040 to Title 26. 88 Stat. 1302. Thus, Section 437d(a)(6)—which omits any reference to litigation in the Supreme Court—was part of the same legislation that amended 26 U.S.C. 9010 and added 26 U.S.C. 9040, both of which expressly authorize the Commission to file petitions for certiorari.

provided in section 1254 of title 28." 2 U.S.C. 437g(a)(9). Section 437g(a)(9) thus shows Congress's understanding that, in the ordinary course, this Court's review of cases brought under Section 437g would be conducted through writs of certiorari or certification and not as appeals. In view of this understanding, as well as Congress's explicit reference to certiorari in Presidential election but no other cases, the reference in Section 437d(a)(6) to the Commission's right to "appeal any civil action in the name of the Commission" cannot sensibly be read as providing the Commission with the authority to petition for a writ of certiorari in all cases. See, *e.g.*, *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993).[8]

[8] The only pertinent legislative history of which we are aware is a statement made in June, 1973, by Assistant Attorney General Robert G. Dixon, Jr., in testimony before the Senate Committee on Rules and Administration regarding the provisions of S. 372, 93d Cong., 1st Sess. See *Federal Election Reform, 1973: Hearings Before the Subcomm. on Priveleges [sic] and Elections and the Senate Comm. on Rules and Administration*, 93d Cong., 1st Sess. 219-226 (1973) [hereinafter *1973 Hearings*]; *id.* at 339-347 (memorandum supplementing testimony of Assistant Attorney General Dixon). S. 372, a predecessor version of the statute (ultimately enacted in 1974) that established the Commission, had been favorably reported by the Senate Committee on Commerce on May 22, 1973. See S. Rep. No. 170, 93d Cong., 1st Sess. Dixon's testimony opposed the creation of independent Supreme Court litigating authority in the Commission. Purporting to quote from the bill, Dixon stated that S. 372 would authorize the Commission "to initiate through civil proceedings for injunctive relief and through presentation to Federal grand juries, prosecute, defend or appeal *to any court* in the name of the commission." *1973 Hearings* at 225 (emphasis added). Dixon expressed the view that under this provision "the Commission's litigating authority would extend to the Supreme Court." *Id.* at 226. A Department of Justice memorandum supplementing Dixon's testimony stated:

3. In concluding that the Commission lacks general independent statutory authority to conduct litigation in this Court, we do not intend to minimize the existence of significant policy arguments that may be thought to favor a grant of such authority. Congress's decision to create an independent Commission was prompted at least in part by its recognition of the highly politicized nature of election disputes and by its belief that the Department of Justice, headed by a Presidential appointee, might not enforce the Act with sufficient vigor against members of the President's political party. See, *e.g.*, *1973 Hearings*

"[W]e assume that the authority 'to defend or appeal to any court' would extend to the Supreme Court." *Id.* at 346. Dixon asserted that "[t]his attempt to divest the Solicitor General of longstanding jurisdiction to handle Supreme Court litigation on behalf of the United States would be contrary to the best interests of both the Federal Government as a major litigant before the Supreme Court, we feel, and of the Court itself." *Id.* at 226. Dixon also submitted the written statement of Solicitor General Erwin N. Griswold regarding a separate legislative proposal; that statement emphasized the importance of the Solicitor General's control over government litigation in the Supreme Court. *Id.* at 318-326.

The phrase "to any court," however, did not in fact appear either in S. 372 as reported by the Commerce Committee or in the legislation ultimately enacted. S. 372 would have authorized the FEC "to initiate (through civil proceedings for injunctive relief and through presentations to Federal grand juries), prosecute, defend, or appeal any court action in the name of the Commission." S. Rep. No. 170, *supra*, at 35 (emphasis omitted); *1973 Hearings* at 302-303 (emphasis omitted); 119 Cong. Rec. 26,616 (1973). The legislation ultimately enacted in 1974 retained much of this language, although it restricted the Commission's litigating authority to civil cases. Assistant Attorney General Dixon's statement makes clear that the Department of Justice attached special importance to the Solicitor General's control over Supreme Court litigation, and that it opposed legislation that would transfer such control to the Federal Election Commission.

at 177, 186; *Federal Election Campaign Act of 1973: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 70-71 (1973); 119 Cong. Rec. 26,610 (1973) (Senator Pastore); cf. *Buckley* v. *Valeo*, 424 U.S. at 134. Congress might reasonably conclude that the need to protect the FEC's enforcement processes from partisan influences warrants an exception to the Solicitor General's usual control over the government's Supreme Court litigation.[9] To date, however, we do not believe that Congress has enacted such an exception into law.[10]

4. For the foregoing reasons, the Commission lacks independent authority to represent itself in this case in this Court. However, by letter dated May 26, 1994, the Solicitor General has authorized the petition filed by the Commission. We believe that this authorization permits the Commission to conduct this litigation on its own behalf in this Court. See 28 U.S.C. 518(a); *Winston*, 170 U.S. at 525. Cf. *Hogg* v. *United States*, 428 F.2d 274, 280

[9] The fact that Congress chooses to make a particular agency generally independent of Presidential direction does not create a presumption that the agency has statutory authority to litigate in this Court on its own behalf. To the contrary, *Providence Journal* makes clear that the Solicitor General is presumptively entrusted with representing in this Court the interests of even those governmental entities (such as the Judicial Branch) that are indisputably shielded from Presidential control. Congress may reasonably determine, however, that the functioning of a particular agency will be unacceptably compromised if it is not permitted to exercise litigating authority in this Court independent of the Attorney General and Solicitor General.

[10] Congress is currently considering a proposal that would explicitly provide the Commission with the authority to appear on its own behalf through its own counsel in any court, specifically extending to petitions for certiorari. H.R. 3, 103d Cong., 1st Sess., § 701, 139 Cong. Rec. H10,684 (daily ed. Nov. 22, 1993).

(6th Cir. 1970) (so long as notice of appeal was timely filed, Solicitor General could authorize the prosecution of an appeal after the expiration of the sixty-day period prescribed by Fed. R. App. P. 4), cert. denied, 401 U.S. 910 (1971).

CONCLUSION

The petition for a writ of certiorari filed by the Commission should be considered by this Court.

Respectfully submitted.

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Assistant Attorney General

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Deputy Solicitor General

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MAY 1994

(5)

No. 93-1151

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

NRA POLITICAL VICTORY FUND, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 18, 1994
CERTIORARI GRANTED JUNE 20, 1994

39 pp

JOINT APPENDIX

TABLE OF CONTENTS

NOTATION

The following documents have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

U.S. DISTRICT COURT
USDC District of Columbia (Washington)

CIVIL DOCKET FOR CASE #: 90-CV-3090

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

NRA POLITICAL VICTORY FUND, GRANT A. WILLS, AS TREASURER OF THE NRA POLITICAL VICTORY FUND, AND NATIONAL RIFLE ASSOCIATION – INSTITUTE FOR LEGISLATIVE ACTION, DEFENDANTS

Docket as of November 12, 1992 (10:32 a.m.)

PROCEEDINGS

12/20/90	1	COMPLAINT filed summons issued (3) (dot) [Entry date 12/31/90]
1/18/91	2	ACKNOWLEDGMENT OF RECEIPT of summons and complaint upon defendant NRA POLITICAL, defendant GRANT A. WILLS, defendant NRA-INSTITUTE (accepted by Robert Dowlut, attorney) on 1/17/91 by mail (kk) [Entry date 01/24/91]
2/6/91	3	ANSWER to the complaint for defendant NRA POLITICAL, defendant GRANT A. WILLS, defendant NRA-INSTITUTE (kk) [Entry date 02/07/91]
		* * * * *
7/19/91	6	MOTION by plaintiff FEC for summary judgment (lpp) [Entry date 07/22/91]

7/19/91	7	MOTION by defendant NRA POLITICAL, defendant GRANT A. WILLS, defendant NRA-INSTITUTE for summary judgment (lpp) [Entry date 07/22/91]
8/20/91	8	RESPONSE by plaintiff FEC in opposition to motion for summary judgment [7-1] by NRA POLITICAL, GRANT A. WILLS, NRA-INSTITUTE (lpp) [Entry date 08/21/91]
8/20/91	9	RESPONSE (OPPOSITIONS) by defendant NRA-INSTITUTE, defendant GRANT A. WILLS, defendant NRA POLITICAL to Plaintiff's statement of material facts not in dispute (lpp) [Entry date 08/21/91]
9/6/91	10	REPLY by plaintiff FEC to response to motion for summary judgment [6-1] by FEC (lpp) [Entry date 09/09/91]
9/6/91	11	REPLY by defendant NRA-INSTITUTE, defendant GRANT A. WILLS, defendant NRA POLITICAL to response to motion for summary judgment [7-1] by NRA POLITICAL, GRANT A. WILLS, NRA-INSTITUTE (lpp) [Entry date 09/09/91]

* * * * *

11/15/91	13	MEMORANDUM OPINION by Judge Stanley Sporkin (N) (egf)
11/15/91	14	ORDER by Judge Stanley Sporkin that defendants and persons in active concert with them in their activities shall not make or receive payments made by a corporation to a segregated fund to reimburse said fund for solicitation expenses unless such payments are made in accordance with each and every requirement of 11 CFR 114.5(b)(3); the defendants shall pay a civil penalty measured by the amount of the total costs incurred by FEC in investigating and prosecuting this action and within 15 days the plaintiff shall submit to the Court a full accounting of all such costs: (N) (egf)

11/21/91	15	NOTICE OF APPEAL by defendant NRA-INSTITUTE, defendant GRANT A. WILLS, defendant NRA POLITICAL from order [14-1] entered 11/15/92, Filing and Docketting Fees Paid: $105.00 Copies sent to: Charles J. Cooper and V. Collen Miller (lpp) [Entry date 11/22/91]
11/22/91	–	TRANSMITTED PRELIMINARY RECORD on appeal [15-1] by NRA POLITICAL, GRANT A. WILLS, NRA-INSTITUTE to U.S. Court of Appeals (lpp)
12/2/91	16	MOTION by plaintiff FEC to amend or clarify order [14-1] (lpp) [Entry date 12/06/91]
12/6/91	–	USCA # 91-5360 assigned for appeal [15-1] by NRA POLITICAL, GRANT A. WILLS, NRA-INSTITUTE (lpp) [Entry date 12/17/91]
12/10/91	19	RESPONSE by defendant NRA-INSTITUTE, defendant GRANT A. WILLS in opposition to motion to amend or clarify order [14-1] [16-1] by FEC (tmp) [Entry date 12/17/91]
12/11/91	17	MEMORANDUM OPINION by Judge Stanley Sporkin (N) (egf)

12/11/91	18	ORDER by Judge Stanley Sporkin directing that the defendants shall collectively pay a civil penalty in the amount of $40,000: (N) (egf)
12/20/91	20	MEMORANDUM AND ORDER by Judge Stanley Sporkin directing the defendants to pay the judgment within 30 days: (N) (egf)

* * * * *

1/17/92	22	ORDER by Judge Stanley Sporkin: granting motion to stay execution of judgment without bond pending appeal [21-1] by NRA POLITICAL, GRANT A. WILLS, NRA-INSTITUTE and that defendants are not required to post a supersedeas bond for the amount of the judgment (N) (cjp)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

91-5360

FEDERAL ELECTION COMMISSION

v.

NRA POLITICAL VICTORY FUND, ET AL., APPELLANTS

APPEAL FROM THE DISTRICT COURT
GENERAL DOCKET

	DATE	FILINGS – PROCEEDINGS
(J)	11/29/91	Copy of notice of appeal and docket entries from clerk, USDC (n-2).
(J)	11/29/91	Docketing fee was paid in the district Court on 11/21/91.

* * * * *

(N)	11/17/92	15 – APPELLANTS BRIEF (p-17)
(N)	11/17/92	7 – APPELLANTS APPENDIX (p-17)
(N)	12/17/92	15 – APPELLEE (FEC) BRIEF (m-17) [6 to 25].

* * * * *

(N)	12/31/92	15 – APPELLANTS REPLY BRIEF (m-31) [6 to 25].
(wl)	2/1/93	ARGUED BEFORE: Wald, Ruth B. Ginsburg, and Silberman Circuit Judges.

	DATE	FILINGS – PROCEEDINGS
(cb)	10/22/93	Opinion for the Court filed by Circuit Judge Silberman.
(cb)	10/22/93	Judgment for the Court that the judgment of the district court is hereby reversed, in accordance with the opinion for the Court filed herein this date.
(cb)	10/22/93	Order delaying mandate.
(cb)	10/25/93	Per Curiam Order for the Court that the opinion filed 10/25/93, is hereby amended, See Order for details. Wald and Silberman, CJs.
		* * * * *
(cb)	12/23/93	MANDATE ISSUED.
		* * * * *
(H)	01/24/94	Notification from Clerk, Supreme court of the filing of a petition for writ of certiorari on 01/18/94. S. Ct. No. 93-1151. [1].
		* * * * *
(E)	06/22/94	Notification from Clerk, Supreme Court granting the petition for writ of Cert. on 6/20/94 No. 93-1151. [1]

A True copy:
Test: Ron Garvin
United States Court of Appeals
for the District of Columbia Circuit

By: /s/ [Signature Illegible] Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO.

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200
PLAINTIFF,

v.

NRA POLITICAL VICTORY FUND
1600 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 828-6000

and

GRANT A. WILLS, as Treasurer of
the NRA Political Victory Fund
1600 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 828-6000

and

NATIONAL RIFLE ASSOCIATION –
INSTITUTE FOR LEGISLATIVE ACTION
1600 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 828-6000

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER APPROPRIATE RELIEF

Jurisdiction

1. This action seeks declaratory, injunctive and other appropriate relief pursuant to the express authority granted to the Federal Election Commission (the "Commission") by the Federal Election Campaign Act of 1971, as amended (the "Act"). 2 U.S.C. §§ 431 *et seq.* This court has jurisdiction over this suit pursuant to 28 U.S.C. § 1345 as an action brought by an agency of the United States expressly authorized to sue by an Act of Congress. *See* 2 U.S.C. §§ 437d(a)(6) and 437g(a)(6)(A).

Venue

2. Venue is properly found in the District of Columbia in accord with 2 U.S.C. § 437g(a)(6)(A), as the defendants can be found, reside and/or transact business in this district.

Parties

3. Plaintiff Federal Election Commission is the independent agency of the United States government empowered with exclusive jurisdiction with respect to the administration, interpretation and civil enforcement of the Federal Election Campaign Act of 1971, as amended (the "Act"). *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a) and 437g. The Commission is authorized to institute investigations of possible violations of the Act, 2 U.S.C. § 437g(a)(1) and (2), and has exclusive jurisdiction to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act. 2 U.S.C. §§ 437c(b)(1) and 437d(e).

4. Defendant NRA Political Victory Fund ("Victory Fund") is a political committee registered with the Commission pursuant to 2 U.S.C. § 431(4). The Victory Fund

is the separate segregated fund of the National Rifle Association of America ("NRA"). The NRA is incorporated in New York and authorized to do business in the District of Columbia.

5. Defendant Grant A. Wills currently serves as treasurer of the Victory Fund. *See* 2 U.S.C. § 432(a).

6. Defendant National Rifle Association–Institute for Legislative Act ("ILA") is the lobbying arm of the NRA. The ILA operates from a corporate account of the NRA. *See Federal Election Commission v. National Rifle Association,* No. 85-1018, slip op. at 3 n.1 (D.D.C. July 27, 1989) (copy attached).

Administrative Proceedings

7. Acting on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, on October 17, 1989, the Commission, by the affirmative vote of at least four of its members, found reason to believe that the Victory Fund and Grant A. Wills, as treasurer, violated 2 U.S.C. § 441b(a), a provision of the Act. On that same date, the Commission also found reason to believe that the ILA violated 2 U.S.C. § 441b(a). The Commission notified the defendants of its reason to believe findings by letter dated November 2, 1989. 2 U.S.C. § 437g(a)(2).

8. After conducting an investigation, the Commission notified the defendants, by letter dated February 9, 1990, that the General Counsel was prepared to recommend that the Commission find probable cause to believe that defendants had violated the Act and provided the defendants with a brief stating the legal and factual issues of the case. On March 12, 1990, the defendants submitted a reply brief for consideration by the Commission.

9. On April 24, 1990, the Commission, by the affirmative vote of at least four of its members, found probable cause to believe that the Political Victory Fund and Grant A. Wills, as treasurer, violated 2 U.S.C. § 441b(a). In addition, the Commission also found probable cause to believe that the ILA violated 2 U.S.C. § 441b(a).

10. Pursuant to 2 U.S.C. § 437g(a)(4), the Commission notified the defendants of its findings of probable cause, by letter dated May 2, 1990, and offered the defendants an opportunity to correct those violations through conciliation. Thereafter, the Commission endeavored, without success, for a period of not less than thirty (30) days, by the informal methods of conference, conciliation and persuasion, to enter into a conciliation agreement with the defendants.

11. Unable through informal methods to secure an acceptable conciliation agreement, the Commission determined, on September 18, 1990, by the affirmative vote of at least four of its members, to authorize the initiation of this civil suit for relief in federal district court against the defendants. *See* 2 U.S.C. § 437g(a)(6). By letter dated September 21, 1990, the Commission notified the defendants of its action.

12. The plaintiff Commission has satisfied all the jurisdictional prerequisites to the filing of this suit.

Statement of Claim

13. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 12.

14. 2 U.S.C. § 441b(a) prohibits corporations from making contributions or expenditures in connection with a federal election and prohibits political committees from knowingly accepting contributions or expenditures from corporations.

15. 2 U.S.C. § 441b(b)(2) provides that the term "contribution or expenditure" includes any direct or indirect payment, advance, deposit, or gift of money, or anything of value to any candidate, campaign committee, or political party or organization, in connection with any federal election.

16. 2 U.S.C. § 441b(b)(2)(C) provides that the term "contribution or expenditure" does not include the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation.

17. 11 C.F.R. § 114.5(b) allows a corporation to use general corporate treasury monies only for the establishment, administration, and solicitation of contributions to its separate segregated fund.

18. 11 C.F.R. § 114.5(b)(3) provides that if the separate segregated fund pays any administrative expense from its own account which the corporation could have paid for as an administrative expense, the corporation may reimburse the separate segregated fund no later than thirty (30) calendar days after the expense was paid by the separate segregated fund.

19. In 1988, the ILA initially paid for production costs and postage for two solicitations to the separate segregated fund, the Victory Fund. The ILA paid $132,756.17 in initial production costs, $91,315.05 in additional production costs and $90,119.56 in postage for a March 1988 fundraiser. Additionally, ILA paid $101,533.94 in postage for a 1988 July fundraiser, for a total of $415,744.72 in solicitation costs for the two fundraisers.

20. On August 1, 1988, the Victory Fund reimbursed the ILA $415,744.72 for the expenses incurred in connection with the March and July fundraisers.

21. On October 20, 1988, the ILA paid the sum of $415,744.72 to the Victory Fund.

22. The ILA's payment of $415,744.72 to the Victory Fund on October 20, 1988, constituted a corporate contribution to the Victory Fund in violation of 2 U.S.C. § 441b(a).

23. The Victory Fund accepted a $415,744.72 corporate contribution from the ILA on October 20, 1988 in violation of 2 U.S.C. § 441b(a).

PRAYER FOR RELIEF

Wherefore, the plaintiff Federal Election Commission prays that this Court:

1. Declare that the defendants NRA Political Victory Fund and Grant A. Wills, as its Treasurer, violated 2 U.S.C. § 441b(a) by accepting a corporate contribution totaling $415,744.72 from the National Rifle Association – Institute for Legislative Action;

2. Declare that the defendant National Rifle Association – Institute for Legislative Action violated 2 U.S.C. § 441b(a) by making a corporate contribution totaling $415,744.72 to the NRA Political Victory Fund;

3. Assess a civil penalty against defendants NRA Political Victory Fund and Grant A. Wills, as its Treasurer, in the amount of the greater of $5,000 or 100 percent of the amount involved in that violation. *See* 2 U.S.C. § 437g(a)(6)(A);

4. Assess a civil penalty against defendants National Rifle Association – Institute for Legislative Action in the amount of the greater of $5,000 or 100 percent of the amount involved in that violation. *See* 2 U.S.C. § 437g(a)(6)(A);

5. Permanently enjoin the defendants from further similar violations of the Federal Election Campaign Act of 1971, as amended;

6. Award the plaintiff Federal Election Commission its costs in this action; and

7. Grant the plaintiff Federal Election Commission such other relief as may be appropriate.

Respectfully submitted,

/s/ LAWRENCE M. NOBLE
Lawrence M. Noble
General Counsel
(D.C. Bar No. 244434)

/s/ RICHARD B. BADER
Richard B. Bader
Associate General Counsel
(D.C. Bar No. 911073)

/s/ DAVID M. FITZGERALD
David M. FitzGerald
Assistant General Counsel

/s/ V. COLLEEN MILLER
V. Colleen Miller
Attorney

December 20, 1990

FOR THE PLAINTIFF
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 90-3090 (SS)

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

NRA POLITICAL VICTORY FUND
1600 Rhode Island Avenue, N.W.
Washington, D.C. 20036

and

GRANT A. WILLS, as Treasurer of
the NRA Political Victory Fund
1600 Rhode Island Avenue, N.W.
Washington, D.C. 20036

and

NATIONAL RIFLE ASSOCIATION—
INSTITUTE FOR LEGISLATIVE ACTION
1600 Rhode Island Avenue, N.W.
Washington, D.C. 20036
DEFENDANTS.

ANSWER

Defendants NRA Political Victory Fund ("NRA PVF"), Grant A. Wills, and National Rifle Association—Institute for Legislative Action ("NRA-ILA"), for their answer to the Complaint of Plaintiff Federal Election Commission ("FEC") state as follows:

First Defense

Plaintiff's Complaint fails to state a claim against Defendants upon which relief can be granted.

Second Defense

This Court lacks jurisdiction over the subject matter of Plaintiff's Complaint.

Third Defense

Defendants did not violate 2 U.S.C. § 441b(a) by either making or receiving a corporate contribution of $415,744.72 because that amount constituted the payment of solicitation costs to a separate segregated fund pursuant to 2 U.S.C. § 441b(b)(2)(C).

Fourth Defense

Under 2 U.S.C. § 438(e), no sanction, including the civil penalties and injunctive relief sought by Plaintiff, may be imposed on Defendants by this Court because all of Defendants' actions alleged by Plaintiff as the basis for such sanctions were taken in good faith reliance on plaintiff's rules and regulations, specifically 11 C.F.R. §§ 114.1(a)(2)(iii) and 114.5(b), and Plaintiff is equitably estopped from seeking such penalties and relief.

Fifth Defense

Defendants did not violate 2 U.S.C. § 441b(a) by either making a corporate expenditure, or receiving a corporate contribution, of $415,744.72 because that amount was not expended for "express advocacy" subject to the prohibition of that statute.

Sixth Defense

Defendants did not violate 2 U.S.C. § 441b(a) as a result of the payment of $415,744.72 by the NRA-ILA to the NRA PVF on October 20, 1988, because that amount was expended for communications by a membership organization to its members within the meaning of 2 U.S.C. § 431(9)(B)(iii).

Seventh Defense

To the extent 2 U.S.C. § 441b(a) prohibited payment of $415,744.72 by the NRA-ILA to the NRA PVF on October 20, 1988, it constitutes a violation of Defendants' First Amendment rights.

Eighth Defense

Plaintiff has no legal authority to initiate and maintain this action because Plaintiff failed to meet the statutory prerequisite of establishing that there was probable cause to believe that Defendants had committed the violation of 2 U.S.C. § 441b(a) alleged in Plaintiff's Complaint. No evidence was identified in the brief of Plaintiff's General Counsel, required to be submitted to Plaintiff and Defendants under 2 U.S.C. § 437g(a)(3), that contradicted the evidence and claim of Defendants that the payment at issue was made for solicitation costs within the meaning of 2 U.S.C. § 441b(b)(2)(C) and could not constitute a violation of 2 U.S.C. § 441b(a).

Ninth Defense

Under the doctrine of separation of powers and Art. II, Sec. 1, Cl.1 of the United States Constitution, Plaintiff has no legal authority to initiate or maintain this action because Plaintiff is statutorily required to include as non-

voting, *ex officio* members the Secretary of the Senate and the Clerk of the House of Representatives.

Tenth Defense

Plaintiff has no legal authority to initiate or maintain this action because its members have been appointed in conformity with the limitations imposed by 2 U.S.C. § 437c(a)(1), an unconstitutional statutory restriction on the President's nomination power under Art. II, Sec. 2, Cl.2 of the United States Constitution.

Eleventh Defense

The statutory delegation to Plaintiff FEC, an "independent agency of the United States government," of "exclusive jurisdiction with respect to the administration, interpretation and civil enforcement of the Federal Election Campaign Act of 1971, as amended," is unconstitutional under the doctrine of separation of powers and Art. II, Sec. 1, Cl. 1 of the United States Constitution. Accordingly, Plaintiff has no legal authority to initiate or maintain this action.

Twelfth Defense

To the extent that the allegations of Plaintiff's Complaint are based on an application of any rule or regulation of the FEC, this action must be dismissed because those rules or regulations are promulgated pursuant to an unconstitutional legislative veto under 2 U.S.C. § 438(d).

Thirteenth Defense

Defendants respond to the averments in each of the numbered paragraphs of Plaintiff's Complaint as follows:

1. Paragraph 1 of Plaintiff's Complaint states conclusions of law and characterizations of the Complaint as to which no answer is required; to the extent an answer is required, however, Defendants deny the averments of Paragraph 1 of Plaintiff's Complaint.

2. Paragraph 2 of Plaintiff's Complaint states conclusions of law as to which no response is required; to the extent an answer is required, however, Defendants deny the averments of Paragraph 2 of Plaintiff's Complaint.

3. Paragraph 3 of Plaintiff's Complaint states characterizations of Plaintiff's legal authority and other conclusions of law as to which no response is required; to the extent an answer is required, however, Defendants deny the averments of Paragraph 3 of Plaintiff's Complaint. Defendants further answer this Paragraph by stating that 2 U.S.C. §§ 437c(b), 437d(a), 437d(e), and 437g speak for themselves.

4. Defendants admit the averments in Paragraph 4 of Plaintiff's Complaint.

5. Defendants deny the averments of Paragraph 5 of Plaintiff's Complaint, except that Defendants admit that Grant A. Wills currently serves as Treasurer of the NRA PVF.

6. Defendants deny the averments of Paragraph 6 of Plaintiff's Complaint, except that Defendants admit that the NRA-ILA has, among other duties, the sole responsibility to administer the legislative activities of the National Rifle Association of America relating to the defense or furtherance of the right to keep and bear arms and that the NRA-ILA operates from bank accounts that are separate and segregated from those of the National Rifle Association of America.

7. Defendants are without knowledge or information sufficient to form a believe as to the truth of the averments in the first and second sentences of Paragraph 7 of Plaintiff's Complaint. Defendants deny the averments in the third sentence of Paragraph 7 of Plaintiff's Complaint, except that Defendants admit that Grant A. Wills, Treasurer of the NRA PVF, received a letter dated November 2, 1989 from Danny L. McDonald, Chairman of the FEC, which speaks for itself, and that Wayne R. LaPierre, Jr., Executive Director of the NRA-ILA, received a letter dated November 2, 1989, from Danny L. McDonald, Chairman of the FEC, which speaks for itself.

8. Defendants deny the averments of the first sentence of Paragraph 8 of Plaintiff's Complaint, except that Defendants admit that Robert Dowlut, Deputy General Counsel of the National Rifle Association of America, received a letter dated February 9, 1990, from Lawrence M. Noble, General Counsel of the FEC, which speaks for itself. Defendants admit the averments of the second sentence of Paragraph 8 of Plaintiff's Complaint.

9. Paragraph 9 of Plaintiff's Complaint states conclusions of law as to which no answer is required; to the extent an answer is required, however, Defendants deny the averments of Paragraph 9 of Plaintiff's Complaint.

10. Defendants deny the averments of Paragraph 10 of Plaintiff's Complaint, except that Defendants admit that Robert Dowlut, Deputy General Counsel of the National Rifle Association of America, received a letter from Lawrence M. Noble, General Counsel of the FEC, dated May 2, 1990, which speaks for itself, and that the FEC did not enter into a Conciliation Agreement with Defendants.

11. Defendants are without knowledge or information sufficient to form a believe as to the truth of the averments in the first sentence of Paragraph 11 of Plaintiff's Complaint. Defendants deny the averments in the second sentence of Paragraph 11 of Plaintiff's Complaint, except that Defendants admit that Robert Dowlut, Deputy General Counsel of the National Rifle Association of

America, received a letter from Lawrence M. Noble, General Counsel of the FEC, dated September 21, 1990, which speaks for itself.

12. Paragraph 12 of Plaintiff's Complaint states conclusions of law as to which no response is required; to the extent an answer is required, however, Defendants deny the averments in Paragraph 12 of Plaintiff's Complaint.

13. In response to the averments of Paragraph 13 of Plaintiff's Complaint, Defendants incorporate by reference, repeat, and re-allege their answers to Paragraphs 1 through 12 of the Complaint as if fully set forth herein.

14. Paragraph 14 of Plaintiff's Complaint states conclusions of law as to which no answer is required; to the extent an answer is required, however, Defendants deny the averments in Paragraph 14 of Plaintiff's Complaint. Defendants further answer this Paragraph by stating that 2 U.S.C. § 441b(a) speaks for itself.

15. Paragraph 15 of Plaintiff's Complaint states conclusions of law as to which no answer is required; to the extent an answer is required, however, Defendants deny the averments in Paragraph 15 of Plaintiff's Complaint. Defendants further answer this Paragraph by stating that 2 U.S.C. § 441b(b)(2) speaks for itself.

16. Paragraph 16 of Plaintiff's Complaint states conclusions of law as to which no answer is required; to the extent an answer is required, however, Defendants deny the averments in Paragraph 16 of Plaintiff's Complaint. Defendants further answer this Paragraph by stating that 2 U.S.C. § 441b(b)(2)(C) speaks for itself.

17. Paragraph 17 of Plaintiff's Complaint states conclusions of law as to which no answer is required; to the extent an answer is required, however, Defendants deny the averments of Paragraph 17 of Plaintiff's Complaint. Defendants further answer this Paragraph by stating that 11 C.F.R. § 114.5(b) speaks for itself.

18. Paragraph 18 of Plaintiff's Complaint states conclusions of law as to which no answer is required; to the extent an answer is required, however, Defendants deny the averments in Paragraph 18 of Plaintiff's Complaint. Defendants further answer this Paragraph by stating that 11 C.F.R. § 114.5(b)(3) speaks for itself.

19. Defendants admit the averments in the first and second sentences of Paragraph 19 of Plaintiff's Complaint. Defendants admit the averments in the third sentence of Paragraph 19 of Plaintiff's Complaint, except that the amount NRA-ILA paid in postage for a 1988 July fundraiser should be $101,553.94.

20. Defendants admit the averments in Paragraph 20 of Plaintiff's Complaint.

21. In response to the averments of Paragraph 21 of Plaintiff's Complaint, Defendants admit that the NRA-ILA expended $415,744.72 in connection with March and July 1988 fundraisers for the NRA PVF; that the NRA PVF reimbursed the NRA-ILA for these expenses on August 1, 1988; and that the NRA-ILA returned this reimbursement to the NRA PVF on October 20, 1988.

22. Defendants deny the averments in Paragraph 22 of Plaintiff's Complaint.

23. Defendants deny the averments in Paragraph 23 of Plaintiff's Complaint.

Except as expressly admitted or otherwise stated above, Defendants deny each and every averment in Plaintiff's Complaint. Defendants further deny that Plaintiff is entitled to the relief sought in Plaintiff's prayer for relief and denies that Plaintiff is entitled to any relief whatsoever.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendants respectfully pray that (a) judgment be entered in favor of Defendants and against Plaintiff, (b) that Plaintiff's Complaint be dismissed with prejudice and with all costs of this action assessed against Plaintiff, and

(c) that this Court award to Defendants an amount sufficient to compensate Defendants for all expenses, including attorney's fees, incurred in connection with this action and such other and further relief as the law and evidence may justify and as this Court may deem just and proper.

Respectfully submitted,

/s/ CHARLES J. COOPER

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[Certificate of Service omitted in printing.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 90-3090 (SS)

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

NRA POLITICAL VICTORY FUND, ET AL., DEFENDANTS.

AFFIDAVIT OF GRANT A. WILLS

I, Grant A. Wills, being duly sworn, depose and say:

1. I am the Treasurer of the National Rifle Association Political Victory Fund ("PVF") and the Fiscal Officer of the National Rifle Association—Institute for Legislative Action ("ILA"). My responsibilities include maintaining complete contribution records and reports, planning and developing financial reporting systems, and preparing, implementing, and conducting fundraising activities.

2. I have been with the National Rifle Association of American ("NRA") for nine years. For my first four years, I served as Assistant Fiscal Officer of the ILS and became the ILS's Fiscal Officer five years ago. For the last six years, I have also served as Treasurer of the PVF.

The National Rifle Association of America

3. The NRA is an educational, recreational, and public service association, in the form of a non-profit, non-stock membership corporation, tax exempt under section 501(c)(4) of the Internal Revenue Code, dedicated to

the right of the individual law abiding citizen to own and use firearms for recreation and defense. As part of its commitment to that right, the NRA has maintained a vigorous and well-known effort to represent its members' views to Congress, the Executive Branch, and state and local governments. Indeed, adding to the collective voice of the NRA to preserve the right to keep and bear arms is the reason most sportsmen, gun owners, and others join the NRA.

4. Any law abiding natural person who subscribes to the objectives and purposes of the NRA is eligible to become an individual member. Non-business entities, such as gun clubs and similar membership associations who subscribe to the objectives and purposes of the NRA, are eligible to become organization members. Organization members do not have any voting privileges within the NRA. No business corporations or labor unions may become members of the NRA. In 1988 the NRA had 2,776,696 individual members and 42,285 organization members. The NRA has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. There are, of course, millions of gun owners who are not NRA members. Virtually all of the NRA's members joined the NRA because they perceived that their rights to own and use firearms are in jeopardy and that the preservation of those rights require them to become involved in legislative and political activities. Thus, NRA members almost invariably joined the NRA as a result of a clear decision to participate in the collective speech of the NRA.

5. The NRA is not affiliated with any business corporation, including any arms or ammunition manufacturer or any business that deals in guns or ammunition. The NRA derives the majority of its revenues from membership dues, which totaled $45,404,300 in 1988. The NRA does not solicit contributions. However, in addition to its

membership dues, in 1988 the NRA received a small amount of unsolicited monetary support in the form of legacies, bequests, and contributions which totalled $103,042.25. This amount included no contributions from labor unions and only $1,774.50 in unsolicited contributions from business corporations.

6. The NRA publishes *American Rifleman, American Hunter, Insights,* and *Shooting Sports, USA*. In 1988, the advertising revenues for these periodicals totaled $8,031,797. Publishing these periodicals in 1988 cost a total of $17,725,922.

7. In addition, various NRA events and activities received partial corporate monetary and in-kind support, such as donated firearms awarded as prizes in shooting competitions, totaling approximately $434,314 in 1988. Those events and activities were the National Action Pistol Championship, the National Coaches Conference, the National Instructor Conference, development of a slide presentation on the U.S. Olympic Shooting Team, the North American Hunter Education Championship, the Western Big Game Hunting School, the National Championship Competitions, booth rental at the NRA Annual Meeting, and miscellaneous activities of NRA representatives including tours of manufacturing plants, press seminars, on-site new products testing and evaluation, and travel related to periodical articles. In short, the NRA is not a "conduit" for corporate money into the political marketplace.

8. The educational, recreational and other nonpolitical activities of the NRA are all related to the furtherance of the right to keep and bear arms, including activities to train individuals in marksmanship and in the safe handling of firearms, activities to promote the shooting sports, and activities to promote hunting as a shooting sport and to promote hunter safety.

9. In 1988, the NRA's gross receipts were $68,240,768 and its gross expenditures were $74,732,953.

The NRA Institute for Legislative Action

10. As its name implies, the ILA is the component of the NRA that, under the Bylaws of the NRA, Defs. Exh. 2 at 31-33, has the sole responsibility to administer the legislative, legal, informational, and fund raising activities of the NRA relating to the defense or furtherance of the right to keep and bear arms, in accordance with the objectives and policies established by the NRA Board of Directors. The ILA does not participate in the recreational or other nonpolitical activities of the NRA. The ILA is not affiliated with any political party or campaign committee.

11. Pursuant to the Bylaws of the NRA, Defs. Exh. 2 at 16-17, the ILA operates from bank accounts that are separate and segregated from those of the NRA and of the PVF. In 1988, the ILA's gross receipts were $21,604,243, and its gross expenditures were $21,016,952. The ILA's gross receipts came from the fund raising efforts of the ILA, funds transferred by the NRA to the ILA for overhead and operating expenses, and funds transferred by the NRA to the ILA for special projects.

12. In 1988, the ILA received total contributions of $9,396,165. Of that amount, $24,689.95—or 0.26%—was received from business corporations. The ILA publishes NRAction, in which no advertising appears. No ILA event was sponsored, subsidized, or otherwise supported by any business corporation or labor organization during 1988.

13. The Bylaws of the NRA explicitly prohibit the NRA, the ILA, or any officer, director, employee, or agent acting on behalf of the NRA or the ILA from making any contribution to a political campaign, candidate, or political committee. Defs. Exh. 2 at 33.

14. Though the ILA's finances are maintained separately from those of the NRA generally, NRA members understand that advocacy and expression in public and political forums concerning the right to keep and bear firearms are essential parts of the mission of the NRA—a mission of which they become a part in joining the NRA—and that the ILA is the component of the NRA responsible for that advocacy and expression. Consistent with this mission and the role of the ILA within the NRA, NRA members understand that NRA general funds are regularly used to support the activities of the ILA. The Bylaws of the NRA explicitly set out the purposes and objectives of the NRA, Defs. Exh. 2 at 1, the role of the ILA within the NRA, *id.*, at 31-33, and the power of the NRA's Board of Directors to authorize the transfer of funds to the ILA. *Id.* at 16-17. Moreover, the Annual Report of the NRA prominently features a description of the activities of the ILA and the funds expended by the ILA. *See, e.g., NRA 1988 Annual Report* 5-6, 18 (Defs. Exh. 4).

The NRA Political Victory Fund

15. The NRA PVF is a separate segregated fund established by the NRA pursuant to the Federal Election Campaign Act, that is, a political action committee. The PVF is not affiliated with any political party.

16. The purpose of the PVF, set out in its Bylaws, is to "promote and strive for the improvement of government by encouraging and stimulating NRA members and other citizens who believe in the preservation of firearms right to take a more active and effective part in government affairs through the electoral process." *Bylaws of the NRA PVF,* Art. II (Defs. Exh. 3).

17. A Board of Trustees has general supervision and control over the affairs and funds of the PVF, establishes

the policies of the PVF, and authorizes all the activities of the PVF. The Board of Trustees consists of employees or officials of the ILA, serving without any additional compensation. The Chairman of the PVF is the Executive Director of the ILA. Any disbursement from the PVF's funds that constitutes a campaign contribution or expenditure under applicable law can be made only by an affirmative vote of not less than three members of the PVF Board of Trustees.

18. The Bylaws of the PVF explicitly provide that "[c]ontributions to the NRA Political Victory Fund shall be solicited and accepted only in conformity with applicable law." *Bylaws of the NRA PVF,* Art. VI, Sec.1 (Defs. Exh. 3).

19. The exclusive method by which the PVF solicits contributions is through direct mail to NRA members. For 1988, the PVF had total receipts of $4,234,446 and total disbursements of $4,363,284.

20. In 1988, no fundraising solicitation mailed by PVF was directed to an entity other than a natural person. The PVF has been supported by the ILA, though it has no general policy with respect to such support except that any such support shall comply with applicable laws, including the Federal Election Campaign Act. The ILA supports the PVF as the result of a two-step process. The Board of Trustees of the PVF decides when to request support from the ILA. The Executive Director of the ILA then decides whether or not to grant the PVF's request. The ILA has commonly paid all or some portion of the solicitation expenses of the PVF as they are incurred. Such payments may be reimbursed by the PVF. There is no set pattern for the ILA to pay for the PVF's solicitation expenses, or for the PVF to reimburse such payments. Rather, such transactions arise out of a judgment concerning the relative

needs of the ILA and the PVF at a particular time, a judgment generally based on the budgets and planned activities of the ILA and the PVF and on the actual revenues of these entities as compared to their anticipated revenues.

The Transactions at Issue

21. Underlying the financial transactions at issue in this case are two solicitations mailed to raise funds for the PVF, the first in March, 1988, the second in July, 1988. A copy of the March, 1988 mailing appears as Defs. Exh. 5. This letter does not contain any explicit words directing the reader how to vote or otherwise pointedly exhorting votes for or against particular persons. No business corporations or labor unions were sent this solicitation. Rather, this letter was sent only to NRA members to reiterate the opposition of the PVF to "gun control" legislation and to gain additional contributions. This was a nationwide mailing, not targeted to individuals who could vote for or against the members of Congress referred to in the letter. In this regard, this letter was similar to mailings the PVF has used to solicit contributions in the past. Most of the express advocacy of the PVF takes the form of direct financial contributions to candidates. However, the PVF has at times engaged in express advocacy through the mail. In contrast to the March and July, 1988 solicitation letters, the PVF's mailings that constitute express advocacy are sent only to individuals who can vote for or against a particular candidate, explicitly urge the recipient to vote for or against a particular candidate, and rarely solicit contributions to the PVF. Examples of such express advocacy letters have been submitted as Defs. Exhs. 25, 26.

22. The ILA paid a direct mail firm $224,071.22 in production cost and $90,119.56 in postage costs for the

March, 1988 fundraising letter. These payments were made in three checks, a March 24, 1988 check for $132,756.17 and an April 13, 1988 check for $91,315.05, both for the production costs, and a June 6, 1988 check for $90,119.56 for postage.

23. A copy of the July, 1988 mailing appears as Defs. Exh. 6. Like the March, 1988 mailing, this letter does not contain any explicit words directing the reader how to vote or otherwise pointedly exhorting votes for or against particular persons. No business corporations or labor unions were sent this mailing. Rather, this letter was addressed only to NRA members. Again, like the March, 1988 letter, it reiterates the opposition of the PVF to public policies that would deprive law abiding individuals of the right to own firearms and seeks contributions.

24. The ILA paid a direct mail firm $101,553.94 in postage costs for the July, 1988 fundraising letter. This payment was made by one check, dated July 18, 1988.

25. As the Fiscal Officer of the ILA and the Treasurer of the PVF, it is an important part of my responsibilities to insure that any disbursements from either of these entities fully comply with applicable law. It was my understanding at the time these disbursements by the ILA were made, and it remains my understanding today, that these payments by the ILA were perfectly lawful in that they did not constitute forbidden contributions or expenditures under the regulations of the FEC and under the Federal Election Campaign Act. As the FEC's regulations provide, "Corporations . . . may use general Treasury monies . . . for the establishment, administration, and solicitation of contributions to its separate segregated fund." 11 C.F.R. 114.5(b). *See also* 2 U.S.C. 441b(b)(2)(C); 11 C.F.R. 114.1(a)(2)(iii). To date the FEC has not suggested that the ILA's payment of the solicitation expenses for the March

and July, 1988 mailings were in any way improper in this case or anywhere else.

26. On August 1, 1988, the PVF reimbursed the ILA for the $415,744.72 of costs for the March and July, 1988 PVF solicitation mailings that had been paid by the ILA.

27. It was my understanding at the time of the PVF's reimbursement of the ILA payments, and it remains my understanding today, that this transaction was completely lawful under the Federal Election Campaign Act and the regulations of the FEC. Obviously, a separate segregated fund is not prohibited from paying for its own solicitation expenses. Reimbursing the ILA for its payment for those expenses simply achieved that result. This transaction was fully reported to the FEC, and, to date the FEC has not suggested this transaction was improper in this case or anywhere else.

28. On October 20, 1988, the ILA wrote a check for $415,744.72 to the PVF to return the PVF's reimbursement for the solicitation costs for the March and July, 1988 fundraising letters. The PVF's reimbursement was returned because it was determined that the judgment to reimburse the ILA was made prematurely, the kind of mistake we take considerable pains to avoid in our budgeting and financial planning for the activities of the ILA and the PVF. Indeed, this transaction was the first time such a mistake was made and a PVF reimbursement to the ILA was returned by the ILA to the PVF. Moreover, we plan not to do this in the future, if possible. Planning activities and reliable budgets for the ILA and the PVF, like budgeting for any organization, serves to prioritize activities based on expected resources, to ensure that the resources of the ILA and the PVF are prudently spent, and generally to advance efficient operations. Shifting funds back and forth between the ILA and the PVF can amount to "robbing Peter to pay Paul," a practice obviously at odds with

any notion of sound management of continuing operations like those of the ILA and the PVF. However, we do not have the benefit of a crystal ball in our planning for the ILA and the PVF each year. As we cannot be assured that our expected revenues and budgets, no matter how conservatively prepared, will come to pass, so we cannot state with absolute certainty that a return of a PVF reimbursement like that here will never be a necessary emergency measure in the future. Moreover, I understood at the time of this transaction, and it remains my understanding today, that this transaction was perfectly lawful. The Federal Election Campaign Act excludes the payment for the solicitation expenses of a separate segregated fund from the definition of forbidden contributions or expenditures, but does not address, much less prohibit or restrict, the various ways in which such solicitation expenses can be paid. The end result of these transactions as of October 20, 1988 was that the ILA paid for the solicitation expenses of the PVF with respect to the March and July, 1988 mailings, a lawful result. In addition, no regulation of the FEC addresses or prohibits the return of a reimbursement as was done here, assuming that such a regulation would even be lawful, given the fact that Congress itself has not seen fit in the FECA to constrain the process by which solicitation expenses are paid for.

29. The PVF fully reported the October 20, 1988 transaction to the FEC. Indeed, it is my understanding that the FEC only became aware of the transaction by virtue of the PVF's report.

I hereby certify that the foregoing statements are true and correct, to the best of my knowledge and belief.

Dated this 10th day of July, 1991.

/s/ GRANT A. WILLS

Grant A. Wills

Subscribed and sworn to me this 10th day of July, 1991.

/s/ DENISE DEAR

Notary Public

My commission expires: July 14, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5360

FEDERAL ELECTION COMMISSION

v.

NRA POLITICAL VICTORY FUND, ET AL., APPELLANTS

[FILED Oct. 22, 1993]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Wald, Ruth B. Ginsburg* and Silberman, Circuit Judges

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JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

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* Former Circuit Judge Ruth B. Ginsburg, now an Associate Justice of the Supreme Court of the United States, was a member of the panel when the case was argued but did not participate in this opinion.

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby reversed in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:
RON GARVIN, Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

Date: October 22, 1993

Opinion for the Court filed by Circuit Judge Silberman.

Supreme Court of the United States

No. 93-1151

FEDERAL ELECTION COMMISSION, PETITIONER

v.

NRA POLITICAL VICTORY FUND, ET AL.

ORDER ALLOWING CERTIORARI.
Filed June 20, 1994.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

June 20, 1994

Justice Ginsburg took no part in the consideration or decision of this petition.

No. 93-1151

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

NRA POLITICAL VICTORY FUND, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER FEDERAL ELECTION COMMISSION

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August 4, 1994

48 MP

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Constitution's separation-of-powers requirement is violated by the inclusion on the Federal Election Commission of two *ex officio* members selected by the Congress, where the statute denies them the right to vote and requires that all decisions on the exercise of the Commission's executive powers be made by majority vote of six Commissioners appointed by the President in conformity with Article II, § 2, cl. 2 of the Constitution.

2. Whether, if question 1 is answered in the affirmative, the actions taken pursuant to statutory authority by the Commission over the course of almost two decades prior to this decision should be accorded *de facto* validity, as this Court did when it found the structure of the original Commission unconstitutional in *Buckley v. Valeo,* 424 U.S. 1 (1976).

STATEMENT NAMING ADDITIONAL PARTIES

Named parties not reflected in the caption are respondent GRANT A. WILLS, as Treasurer of the NRA Political Victory Fund, and respondent NATIONAL RIFLE ASSOCIATION-INSTITUTE FOR LEGISLATIVE ACTION.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1151

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

NRA POLITICAL VICTORY FUND, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The October 22, 1993, opinion, as amended October 25, 1993, of the court of appeals is reported at 6 F.3d 821 (D.C. Cir. 1993), and is reprinted as Appendix A of the Federal Election Commission's petition for writ of certiorari (Pet. App. 1a-18a). The district court's November 15, 1991, opinion and order, as amended December 10, 1991, are reported at 778 F. Supp. 62 (D.D.C. 1991), and appear in Appendix B of the petition (Pet. App. 19a-35a).

JURISDICTION

On October 22, 1993, the United States Court of Appeals for the D.C. Circuit entered judgment in this *de novo* civil law enforcement proceeding, reversing the

district court's judgment in favor of the Commission. In doing so, the court found that 2 U.S.C. § 437c(a)(1) violates the constitutional requirement of separation of powers in providing for the inclusion on the Federal Election Commission ("the Commission" or "FEC") of two *ex officio* members selected by the Congress, who have no right to vote on the exercise of the Commission's powers. The court did not reach the merits of the violations found by the district court because of its conclusion that an agency whose structure violates the Constitution cannot conduct civil law enforcement litigation. On January 18, 1994, the Commission filed a timely petition for writ of certiorari, which was granted on June 20, 1994. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The Federal Election Campaign Act of 1971, as amended ("the Act"),[1] codified at 2 U.S.C. §§ 431-455, establishes the Commission as an independent agency with exclusive jurisdiction over the administration and civil enforcement of the Act and the presidential public financing provisions codified in Chapters 95 and 96 of Title 26. 2 U.S.C. § 437c(b)(1). The Act provides that "[t]he Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate." 2 U.S.C. § 437c(a)(1). This case involves the constitutionality of the part of section 437c(a)(1) that includes on the Commission the two nonvoting *ex officio* members selected by Congress. Appendix F to the Commission's petition for writ of certiorari sets out in full 2 U.S.C. § 437c and other provisions of the Act describing the Commission's structure, powers, and duties (Pet. App. 42a-67a).

[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976); by the Social Security Amendments of 1977, Pub. L. No. 95-216, tit. V, § 502, 91 Stat. 1565 (1977); by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980); by the Trademark Clarification Act of 1984, Pub. L. No. 98-620, tit. IV, § 402, 98 Stat. 3357 (1984); by Pub. L. No. 100-352, § 6(a), 102 Stat. 663 (1988); by Pub. L. No. 101-194, tit. VI, § 601(b)(1), 104 Stat. 161 (1990); and by Pub. L. No. 102-90, tit. I, § 6(d), 105 Stat. 451 (1991).

STATEMENT OF THE CASE

A. The Federal Election Commission

1. Background

The Federal Election Campaign Act of 1971 originally designated three "supervising officers" to administer the statute's provisions: the Secretary of the Senate, with respect to candidates for Senator; the Clerk of the House of Representatives, with respect to candidates for Representative or Delegate; and the Comptroller General, for all other cases. Federal Election Campaign Act of 1971 ("1971 FECA"), Pub. L. No. 92-225, § 301(g), 86 Stat. 12 (1972). Their duties included issuing regulations, receiving financial disclosure reports from political committees, making that information available to Congress and the public, conducting audits, investigating complaints of alleged violations of the disclosure rules, and referring possible violations to the Attorney General, who was responsible for bringing civil enforcement actions and criminal prosecutions. 1971 FECA, §§ 304, 306, 308, 86

Stat. 14, 16, 17. After the Commission was created in 1974, the Secretary of the Senate and the Clerk of the House continued to have responsibility, "as custodians for the Commission," for receiving campaign finance reports and statements from candidates' political committees, Federal Election Campaign Act Amendments of 1974 ("1974 FECA"), Pub. L. No. 93-443, § 208(a), (c), 88 Stat. 1263, 1280, 1284, 1286 (1974), a responsibility they continue to have today. 2 U.S.C. §§ 432(g), 434(a)(2).

Congress created the Commission in 1974, in response to the Watergate crisis. In an effort to restore public confidence in the integrity of the federal election campaign financing system, Congress removed the civil enforcement of the campaign financing statutes from the Department of Justice, which was seen as being subject to the partisan influence of the President, and entrusted it instead to an independent, nonpartisan agency. *See* 1974 FECA, § 208, 88 Stat. 1280-1288. The new Commission was composed of the Secretary of the Senate and the Clerk of the House, *ex officio* and without the right to vote, and six voting members. Four of those six members were appointed by members of Congress (two by the President pro tempore of the Senate and two by the Speaker of the House) and the President appointed the remaining two. All six had to be confirmed by a majority of both Houses, and the two members appointed by each of the three appointing authorities could not be affiliated with the same political party. *Id.*, 88 Stat. 1281.

In *Buckley v. Valeo*, 424 U.S. 1, 118-137 (1976), this Court held that the granting of executive powers to such an agency, whose voting members were not appointed by the President pursuant to Article II, § 2, cl. 2, violated the Constitution's separation-of-powers requirement. However, the Court also concluded that "the Commis-

sion's inability to exercise certain powers because of the method by which its members [were] selected should not affect the validity of the Commission's administrative actions and determinations to this date," 424 U.S. at 142. The Court accordingly ruled that "[t]he past acts of the Commission are . . . accorded *de facto* validity." *Id.* The Court also stayed its judgment concerning the Commission's authority for 30 days to afford Congress an opportunity to reconstitute the Commission and ensure uninterrupted enforcement of the Act. *Id.* at 143. The Court "allow[ed] the present Commission in the interim to function *de facto* in accordance with the substantive provisions of the Act." *Id.* When Congress enacted curative legislation, *see* Federal Election Campaign Act of 1976 ("1976 FECA"), Pub. L. No. 94-283, 90 Stat. 475 (1976), it also adopted provisions recognizing the *de facto* validity of all the actions taken by the Commission before it was restructured to conform to the Constitution.[2]

2. The Structure of the Commission

In 1976, Congress enacted legislation that restructured the Commission in accord with the constitutional requirements established in *Buckley v. Valeo,* 424 U.S. at 118-137, and reestablished it as the independent agency of the United States Government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Act and of Chapters 95 and 96 of Title 26. *See*

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[2] "All orders, determinations, rules, and opinions made, issued, or granted by the Federal Election Commission before its reconstitution under the amendments made by this Act . . . shall continue in effect to the same extent as if such transfer had not occurred." 1976 FECA, § 101(g)(3), 90 Stat. 477. The legislation also provided that pending litigation in which the Commission was a party "shall not abate" as a result of the reconstitution of the Commission. *Id.*, § 101(g)(5).

generally 1976 FECA, §§ 101, 107-109, 90 Stat. 475-77, 481-86, especially the provisions currently codified at 2 U.S.C. §§ 437c(b)(1), 437d(a), (e), and 437g. The Commission has six voting members appointed to staggered six-year terms by the President, with the advice and consent of the Senate. 2 U.S.C. §§ 437c(a)(1), 437c(a)(2)(A). No more than three of these members may be affiliated with the same political party. 2 U.S.C. § 437c(a)(1).

The affirmative votes of at least four of these six members are required for any official Commission action, and a voting Commissioner "may not delegate to any person his or her vote or any decision-making authority or duty vested in the Commission," 2 U.S.C. § 437c(c). Affirmative votes of four of these six Commissioners are specifically required for finding that there is "reason to believe" a violation of the Act has occurred, which initiates a Commission investigation, 2 U.S.C. § 437g(a)(2), or finding that there is "probable cause to believe" that a violation has occurred, which leads to mandatory conciliation efforts. 2 U.S.C. §§ 437c(c), 437g(a)(4). If conciliation fails, the Commission, upon the affirmative vote of at least four of these six Commissioners, may decide to file a *de novo* civil enforcement suit, like the present case. 2 U.S.C. § 437g(a)(6)(A).

Section 437c(a)(1) also includes on the Commission two additional officials, the Secretary of the Senate and the Clerk of the House of Representatives, or their designees. The statute specifies, however, that these two officials serve only in an *ex officio* capacity, do not have the right to vote on the exercise of any of the Commission's powers, and may not serve as chairman or vice chairman of the Commission. 2 U.S.C. §437c(a)(1), (5). The Commission's procedural rules, adopted pursuant to 2 U.S.C. § 437c(e), deny the *ex officio* members such procedural rights as calling a meeting, voting to adjourn or to select a presiding officer in the absence of the chairman, and being counted in determining the presence of a quorum. Commission Directive No. 10, *Rules of Procedure of the Federal Election Commission*, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 2043, at 2512-2514 (July 13, 1978). The Act and Commission regulations also preclude any person, including the *ex officio* members, from disclosing confidential enforcement matters to persons outside the agency. 2 U.S.C. § 437g(a)(12); 11 C.F.R. § 111.21.

B. The NRA's Violation of 2 U.S.C. § 441b: Contributing More Than $400,000 In Corporate Funds To Its Separate Segregated Fund

The Act prohibits a corporation from making "a contribution or expenditure in connection with any federal election." 2 U.S.C. § 441b.[3] The Act also prohibits political committees from knowingly accepting such corporate contributions, 2 U.S.C. § 441b(a). A limited exception to this prohibition permits a corporation to expend its general treasury funds for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by [the] corporation," 2 U.S.C. § 441b(b)(2)(C). However, funds can be contributed to such a separate segregated fund only by the corporation's stockholders and executive or administrative personnel and their families, 2 U.S.C. § 441b(b)(4)(A), and by a membership corporation's members, 2 U.S.C. § 441b(b)(4)(C), not by the corporation itself. If a separate segregated fund chooses to expend its own funds for its administrative or solicitation ex-

[3] For purposes of this prohibition, "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value" is a "contribution or expenditure." 2 U.S.C. § 441b(b)(2).

penses, the connected corporation may reimburse the fund for these expenditures "no later than 30 calendar days after the expense was paid by the separate segregated fund." 11 C.F.R. § 114.5(b)(3). Any corporate payments to the separate segregated fund after the expiration of this 30-day period are corporate contributions prohibited by 2 U.S.C. § 441b(a).

The National Rifle Association ("NRA") is a nonprofit membership corporation that operates a separate segregated fund, established pursuant to 2 U.S.C. § 441b(b)(2)(C), called NRA Political Victory Fund ("PVF") (Pet. App. 20a). PVF is registered with the Commission under 2 U.S.C. § 431(4) as a multi-candidate political committee that contributes to federal candidates.

In March and July of 1988 a division of NRA used corporate funds to produce and mail to NRA members letters soliciting contributions to PVF (Pet. App. 20a). On August 1, 1988, PVF transferred to this NRA division $415,744.72, an amount equal to the combined cost of the solicitations (Pet. App. 20a-21a). Later, respondent Grant A. Wills, who was both PVF's treasurer and the NRA corporate division's fiscal officer, concluded that because PVF's expected revenues had not met projections PVF had insufficient funds for the political contributions and expenditures NRA wanted to make during the upcoming election campaign (Pet. App. 22a, 23a). To compensate for this deficit, the NRA division transferred $415,744.72 of its corporate funds to PVF on October 20, 1988, just 19 days before the November 8, 1988, election (Pet. App. 21a). PVF quickly converted these corporate funds into political contributions and expenditures (Pet. App. 3a).[4]

[4] The financial reports PVF filed with the Commission after the election, pursuant to 2 U.S.C. § 434(a)(4), disclosed that in the 18 days after the October 20th transfer of corporate funds to PVF, PVF made more than $262,000 in direct and in-kind contributions to 110 federal candidates in 38 states. A copy of this report was included in the record below (pp. 264-80 of the joint appendix in the court of appeals).

C. The Administrative Proceedings

In October 1989, by an affirmative vote of at least four of the six voting Commissioners, the Commission found "reason to believe," 2 U.S.C. § 437g(a)(2), that the respondents had violated 2 U.S.C. § 441b(a) as a result of the NRA division's October 20, 1988, transfer to PVF of $415,744.72 in corporate funds (Pet. App. 36a-37a). After an investigation, the Commission, by an affirmative vote of at least four of the six voting Commissioners, found "probable cause to believe," 2 U.S.C. § 437g(a)(4)(A)(i), that the respondents had violated section 441b(a) (Pet. App. 38a-39a). When its conciliation attempts failed, the Commission, by an affirmative vote of at least four of the six voting Commissioners, authorized the filing of the present civil enforcement action (Pet. App. 40a-41a; J.A. 7-13).[5] *See* 2 U.S.C. § 437g(a)(6)(A). At no time during the administrative proceedings did NRA object to the participation of the *ex officio* members, request their exclusion from the case, or question the Commission's constitutional authority to conduct the proceedings or make any of these determinations.

D. The Proceedings in the District Court

On cross-motions for summary judgment, the district court found that the October 20 transfer of money was "intended to bolster the PVF's accounts for its campaign-related activities in support of particular candidates"

[5] "J.A. ____" references are to the consecutively numbered pages of the Joint Appendix.

rather than to pay for solicitation expenses (Pet. App. 23a). The court also found that the transfer was too late, under the Commission's regulations, to be treated as a lawful reimbursement for the solicitation expenditures that had been made in April and July (Pet. App. 22a). Accordingly, the district court held that the transfer of $415,744.72 in corporate funds to PVF was a corporate contribution that violated 2 U.S.C. § 441b (Pet. App. 24a). The court assessed a $40,000 civil penalty and enjoined the defendants from repeating their violations, finding that "the NRA defendants acted deliberately to circumvent prescribed reimbursement and contribution requirements" and that their arguments "would make a mockery of the campaign finance laws" (Pet. App. 33a).

In the district court NRA also raised several affirmative defenses, among which was the claim that Congress violated the Constitution's separation-of-powers requirement by placing the Secretary of the Senate and the Clerk of the House, or their designees, on the Commission in a nonvoting, *ex officio* capacity (J.A. 16-17). The district court concluded that this argument provided no defense in this civil law enforcement suit because NRA had neither alleged nor provided evidence that the nonvoting *ex officio* members had affected, or even been present to discuss, any of the Commission's actions involving the NRA (Pet. App. 26a). Accordingly, the court found that NRA had failed to show a sufficient stake in the resolution of this constitutional issue to require the court to resolve it in this lawsuit. The court observed, however, that because the Secretary of the Senate and the Clerk of the House have no vote, they "have no real say in the outcome of any Commission proceeding" (Pet. App. 26a).

E. The Proceedings in the Court of Appeals

A two-judge panel of the D.C. Circuit reversed the district court's judgment.[6] The court did not reach the merits of the statutory violation found by the district court, but instead addressed only NRA's arguments that the Commission's structure violates the Constitution (Pet. App. 4a). The court rejected two of NRA's constitutional attacks on the Commission as either wrong or nonjusticiable in the circumstances of this case (Pet. App. 8a-12a), but it found that the Commission's structure violated the constitutional separation-of-powers doctrine in that "Congress exceeded its legislative authority when it placed its agents, the Secretary of the Senate and the Clerk of the House of Representatives, on the independent Commission as non-voting *ex officio* members" (Pet. App. 2a). Concluding that the Constitution would not allow an agency so structured to prosecute a civil law enforcement action, the court of appeals reversed the district court's judgment against NRA without reviewing the merits of its decision.

The court of appeals explicitly acknowledged that its holding went beyond any of this Court's precedents because the congressional agents whose roles this Court had previously found to violate separation of powers had all "possessed explicit voting or decisionmaking power that is not present here" (Pet. App. 15a). But the court found the lack of any power to vote on the exercise of the Commission's executive powers to be of no significance. "Even if the *ex officio* members were to remain completely silent during all deliberations . . . , their mere presence as agents of Congress conveys a tacit message to the other Commis-

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[6] Justice Ginsburg sat on the appellate panel that heard oral argument in this case but "did not participate in [the court's] opinion" (Pet. App. 1a n.*).

sioners. The message may well be an entirely appropriate one—but it nevertheless has the potential to influence the other Commissioners" (Pet. App. 13a-14a).

> The Constitution . . . "anticipates that the coordinate Branches will converse with each other on matters of vital common interest." *Mistretta v. United States,* 488 U.S. 361, 408 (1989). The Commission argues that Congress intended *ex officio* membership to fulfill this coordinating function by having the Secretary and the Clerk play a mere "informational or advisory role" in agency decisionmaking. Advice, however, surely implies influence, and Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role.

(Pet. App. 15a.) On this basis, the court concluded that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution" (Pet. App. 15a).

The court found that, under the Act's severability clause, 2 U.S.C. § 454, "the unconstitutional *ex officio* membership provision can be severed from the rest of [the Act]," so that "Congress is not even required after our decision, as it was after *Buckley* [*v. Valeo,* 424 U.S. 1 (1976)], to amend the statute" (Pet. App. 17a, 16a). But the court rejected the Commission's argument that, regardless of whether the *ex officio* provision is constitutional, the civil law enforcement action against NRA should be preserved under the *de facto* officer doctrine (Pet. App. 17a-18a). The court acknowledged that this Court had applied the *de facto* officer doctrine in *Buckley,* 424 U.S. at 142-43, to recognize the validity of the Commission's past actions after finding that the Commission's structure, which then included four *voting* Commissioners appointed by Congress, violated the Constitution's separation-of-powers requirement (Pet. App. 17a). But the

court of appeals declined to follow this precedent because the constitutionality of the Commission's structure was raised here as an affirmative defense to a law enforcement suit, and the court could not "declare the Commission's structure unconstitutional without providing relief to the appellants in this case" (Pet. App. 17a, 18a).

Four days later, on October 26, 1993, the Commission voted to reconstitute itself as a six-member agency without *ex officio* members in accord with the court of appeals decision, subject to further action by this Court. *See* FEC, Annual Report 1993, at 3-4, 27 (June 1, 1994).[7] The reconstituted Commission has devoted substantial resources to ratifying and/or reconsidering its prior actions in ongoing proceedings in an effort to continue to administer and enforce the Act as effectively as possible while conforming with the decision below. *See id.*; 58 Fed. Reg. 59,640, 59,642 (Nov. 10, 1993). The adequacy of the Commission's efforts to comply with this decision has been challenged so far in four cases in district courts and three cases at the appellate level. To date, one district court has addressed the issue, denying a motion to dismiss a civil enforcement case filed before the decision below because the Commission had, after it was reconstituted, voted to ratify its prior decisions and to continue prosecuting the lawsuit. *FEC v. National Republican Senatorial Comm.*, No. 93-1612 (D.D.C. Feb. 8, 1994) (Hogan, J.).

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[7] The Commission has lodged with the Clerk of Court copies of the Commission's annual report, which is issued pursuant to 2 U.S.C. § 438(a)(9).

SUMMARY OF ARGUMENT

1. The 1976 amendments to the Federal Election Campaign Act of 1971 ("the Act") established the Federal Election Commission as an independent, nonpartisan agency "composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate." 2 U.S.C. § 437c(a)(1). The primary issue before the Court is whether the mere presence at the Commission of these two congressional officials, in a nonvoting advisory and informational role, violates the Constitution's requirement of separation of powers among the three branches of government.

The Constitution does not permit Congress or its agents "to exercise the responsibilities of the other Branches," but this Court has "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." *Mistretta v. United States*, 488 U.S. 361, 382 (1989). There is no dispute in this case that the Secretary and the Clerk are agents of Congress who "may not be entrusted with executive powers." *Bowsher v. Synar*, 478 U.S. 714, 732 (1986). The Act does not violate the Constitution, however, because it does not give them any direct or indirect control over the exercise of the Commission's executive powers.

The Act specifies that the Commission can only exercise its statutory powers pursuant to the votes of a majority of the six Commissioners that are nominated by the President and confirmed by the Senate pursuant to Article II, § 2, cl. 2 of the Constitution. 2 U.S.C. §§ 437c(c); 437g(a)(2), (4), (6). Thus, by explicitly providing that the *ex officio* members are "without the right to vote," 2 U.S.C. § 437c(a)(1), and forbidding any voting Commissioner

from delegating voting authority to any other person, 2 U.S.C. § 437c(c), Congress carefully reserved all of the Commission's executive authority to the six Commissioners appointed by the President. The only power given to the *ex officio* members by the Act is to give advice and express their views to the voting Commissioners during Commission meetings, and the voting Commissioners are entirely free to disregard that advice with impunity and exercise the Commission's powers as they see fit.

In sum, the Constitution only requires the separation of *powers*, and does not restrict the members of one branch of government from merely advising or seeking to persuade independent decisionmakers in another branch. Therefore, Congress did not violate the Constitution by giving the Secretary and the Clerk this carefully restricted advisory role at this nonpartisan independent agency, in which they have no right to control, or even to participate in, the votes that are the only mechanism through which the Commission can exercise its executive powers.

2. If this Court finds unconstitutional the portion of 2 U.S.C. § 437c(a)(1) providing for nonvoting *ex officio* members of the Commission, the Court should follow its precedent in *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976), and preserve the public interest in the uninterrupted administration and enforcement of the Act by according *de facto* validity to the Commission's actions prior to this decision. In *Buckley*, when the Court invalidated the structure of the original Commission on separation-of-powers grounds because a majority of the *voting* Commissioners had been appointed by members of Congress, it accorded *de facto* validity to the Commission's past actions in administering and enforcing the campaign finance statutes. In addition, it stayed its decision to permit the Commission to continue administering the Act for a short period while Congress had an opportunity to restructure

the Commission to conform to the Constitution. As the court of appeals found, however, the *ex officio* provision at issue here is severable from the remainder of the Act, so that after departure of the *ex officio* members the six Commissioners appointed by the President can continue to administer the Act without any action by Congress.

By recognizing the *de facto* validity of the Commission's past actions, the Court can fully remedy Respondents' constitutional claim and still protect the public interest in uninterrupted enforcement of the Act. Their claimed constitutional right to have the law enforced against them only at the behest of an agency meeting constitutional requirements would be preserved if the Commission, after being reconstituted without *ex officio* members, has an opportunity to decide whether to continue prosecuting this civil law enforcement action before the court of appeals proceeds to consideration of the merits of the case. *See* Fed. R. Civ. P. 25(d), and 1961 Advisory Committee Notes. If the reconstituted Commission decided to proceed, there would be no remaining constitutional impediment to entry of judgment against them if the court of appeals were to uphold the district court's findings that they violated the Act.

3. Although Respondents filed no cross-petition, they raised three issues in their brief in opposition that were not presented in the petition for certiorari. The court of appeals rejected their arguments on two of these issues, presenting additional constitutional challenges to the Commission, and the district court rejected their arguments on the third issue, whether they violated the Act.

The Court should decline to reach any of these issues. None is a necessary predicate to the resolution of the questions presented in the petition for certiorari and Respondents have not shown that any of them warrants plenary review by this Court. In fact, the two constitutional issues

they raise would be premature on the facts of this case, and their arguments for reversing the district court's application of the Act and the Commission's regulations to the undisputed facts of this case have not yet been reviewed by the court of appeals. Accordingly, there is no reason for the Court to address any of these extraneous issues presented by Respondents.

ARGUMENT

I. SEPARATION OF POWERS IS NOT VIOLATED BY THE INCLUSION OF NONVOTING *EX OFFICIO* MEMBERS ON THE FEDERAL ELECTION COMMISSION

Although this Court has repeatedly "reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches," the Court has "never held that the Constitution requires that the three Branches of Government 'operate with absolute independence.' " *Morrison v. Olson,* 487 U.S. 654, 693-94 (1988) (quoting *United States v. Nixon,* 418 U.S. 683, 707 (1974)). Rather than requiring "a hermetic division among the Branches" of the federal government, the separation-of-powers principle is a " 'safeguard against the encroachment or aggrandizement of one branch at the expense of the other.' " *Mistretta v. United States,* 488 U.S. 361, 381, 382 (1989) (quoting *Buckley v. Valeo,* 424 U.S. at 122).

Accordingly, this Court has consistently applied the separation-of-powers principle, as its name suggests, solely as a restriction on the distribution of governmental *power* within our constitutional system, and not as a restriction on opportunities for "the coordinate Branches [to] converse with each other on matters of vital common interest." *Mistretta,* 488 U.S. at 408. The Court has "invalidated attempts by Congress to *exercise* the responsibilities of other

Branches or to reassign *powers* vested by the Constitution in either the Judicial Branch or the Executive Branch." *Id.* at 382 (emphases added). However, it has "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." *Id.*

In this case, the court of appeals concluded (Pet. App. 16a) that Congress violated the Constitution in "plac[ing] its agents 'beyond the legislative sphere' by naming them to membership on an entity with executive powers." This Court has explained, however, that "the Constitution imposes two basic and related constraints on the Congress" to "forestall the danger of encroachment 'beyond the legislative sphere' ":

> It may not "invest itself or its Members with either executive power or judicial power." . . . And, when it exercises its legislative power, it must follow the "single, finely wrought and exhaustively considered, procedures" specified in Article I.

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274 (1991) (citations omitted). It has not been alleged in this case that Congress has violated the second constraint. With respect to the first constraint, it is undisputed that the *ex officio* members of the Commission are agents of the Congress who, under the Court's analysis in *Bowsher v. Synar*, 478 U.S. 714, 728-31 (1986), "may not be entrusted with executive powers." *Id.* at 732. Thus, as in *Bowsher*, 478 U.S. at 732, the only "remaining question is whether [they] ha[ve] been assigned such powers."

The Act vests the *ex officio* members of the Commission with no authority to determine how the Commission exercises any part of its executive powers. After this Court's decision in *Buckley v. Valeo*, 424 U.S. at 109-141, that the

appointment of voting Commissioners by Congress was unconstitutional, Congress amended the Act to require that all six members of the Commission possessing a vote on the exercise of its powers must be nominated by the President and confirmed by the Senate in accord with the Appointments Clause of the Constitution, Art. II, § 2, cl. 2. *See* 2 U.S.C. § 437c(a)(1). Congress went to great lengths to specify that the power to administer and enforce the Act is vested exclusively in these six Commissioners appointed by the President. The statute explicitly provides that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission," 2 U.S.C. § 437c(c),[8] and that the *ex officio* members are "without the right to vote" on such decisions, 2 U.S.C. § 437c(a)(1). The statute also specifies that a Commissioner "may not delegate to any person his or her vote or any decision-making authority or duty vested in the Commission by the provisions of this Act," 2 U.S.C. § 437c(c). By so carefully reserving all authority to the six Commissioners appointed by the President, the Act effectively precludes the *ex officio* members not only from controlling, but even from participating in, the votes that are the only mechanism by which the Commission can exercise its executive powers.[9]

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[8] The statute reemphasizes this restriction on the exercise of the Commission's civil law enforcement powers. *See* 2 U.S.C. § 437g(a)(2), (4), (6).

[9] The Act also prohibits the *ex officio* members from having even such indirect procedural control as might be obtained by serving as chairman or vice chairman, 2 U.S.C. § 437c(a)(5), and the Commission's procedural rules explicitly deny them the rights enjoyed by voting Commissioners to call a meeting, to vote either to adjourn or to select a presiding officer in the absence of the chairman, or even to be counted in determining a quorum. *See* Commission Directive No. 10,

In fact, the statute empowers these individuals in their limited *ex officio* role to do nothing more than to give advice and express their views to the voting Commissioners during Commission meetings. The voting Commissioners are free to disregard the advice of the *ex officio* members with impunity and to cast their votes to exercise the Commission's powers as they see fit. Moreover, many Commission decisions are made by circulation or notation vote without any discussion at a meeting. *See* Commission Directive No. 52, *Circulation Vote Procedures* (rev. June 3, 1992); 11 C.F.R. § 2.2(d)(2).[10] In addition, 2 U.S.C. § 437g(a)(12) effectively precludes the *ex officio* members, like everyone else, from disclosing to persons outside the agency—including members of Congress—any confidential information about agency enforcement matters. *See also* 11 C.F.R. § 111.21. The statute and implementing regulations thus give the *ex officio* members no power to interfere in any way in the exercise of the Commission's powers by the six Commissioners appointed by the President.[11]

Rules of Procedure of the Federal Election Commission, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 2043, at 2512-2514 (July 13, 1978).

[10] Copies of Directive No. 52 have been lodged with the Clerk of Court.

[11] The conclusion of the court of appeals that "[a]t least certain members of Congress" expected the *ex officio* members to "serve its interests" (Pet. App. 13a) is both irrelevant and misleading. It is irrelevant because a statute that does not confer upon agents of Congress any direct or indirect control over the exercise of executive power is not made unconstitutional by the often unrealistic hopes or expectations of individual legislators. It is misleading because the dialogue between two Senators cited by the court of appeals actually reflects only uncertainty about the role the *ex officio* members would be able to play at the Commission under the statutory provisions being adopted. In contrast, Senator Kennedy had initially proposed retaining the *ex officio* members at the Commission in 1976 because their

The court of appeals did not disagree with the conclusion that the *ex officio* members of the Commission have no statutory authority to exercise executive powers. Instead, the court's view was that the lack of executive power is not enough to satisfy the Constitution, and that the Act violates the Constitution because the *ex officio* members are in a position where they have "the potential to influence" the decisions of the six voting Commissioners appointed by the President (Pet. App. 13a-14a). However, James Madison explained that the key to separation of powers for "all sides" among the Founders was that no branch of the federal government be permitted to have "an *overruling influence* over the others." The Federalist No. 48, at 332 (J. Cooke ed. 1961) (emphasis added). Thus, Congress "has the power to seek to influence executive action through the force of its opinions" or to permit its agents "to influence the executive's execution of the laws through the powers of public illumination and persua-

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"expertise, knowledge, and understanding" would be "useful for the Commission," *Federal Election Campaign Act Amendments, 1976: Hearing Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration* ("*1976 Hearing*"), 94th Cong., 2d Sess. 74-75 (1976), *reprinted in* FEC, *Legislative History of Federal Election Campaign Act Amendments of 1976* ("*1976 Leg. Hist.*"), at 80-81 (August 1977). One of the original voting Commissioners testified that the *ex officio* members had, in fact, "served in consultative functions, a liaison function," and that the voting Commissioners had "found their service helpful rather than otherwise." *1976 Hearing* at 155, *reprinted in 1976 Leg. Hist.* at 161 (testimony of FEC Vice Chairman Thomas Harris). The institutional roles of the Secretary of the Senate and the Clerk of the House give them a special understanding of the daily functioning of the Senate and the House that can be particularly relevant to some of the political issues within the Commission's jurisdiction. These officials also had accumulated considerable experience in administering the campaign finance laws before the Commission was created. *See* pp. 3-4, *supra*.

sion." *Ameron, Inc. v. United States Army Corps of Engineers*, 809 F.2d 979, 992, 993 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988). "[T]he critical issue is whether Congress or its agent seeks to *control* (not merely to 'affect') the execution of its enactments without respect to the Article I legislative process. . . . If Congress 'in effect has retained control,' its action and the statutory provision on which it is based is unconstitutional." *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1108 (9th Cir. 1988) (emphasis in original) (quoting *Bowsher v. Synar*, 478 U.S. at 734), *rev'd on a different issue*, 893 F.2d 205 (9th Cir. 1989) (en banc). The court below itself recognized in a later case that "influence is not control," *Washington Legal Foundation v. United States Sentencing Comm'n*, 17 F.3d 1446, 1451 (D.C. Cir. 1994).[12]

Consistent with that view, this Court has never applied the separation-of-powers principle as a restriction on statutory opportunities for members of one branch to seek to influence another branch's exercise of its own constitutional powers by the mere persuasiveness of their advice

[12] During the 1976 hearings, the Ford Administration suggested that the presence of the *ex officio* members at Commission meetings can be analogized to the participation in deliberations of a decisionmaker recused for conflict of interest. *See 1976 Hearing* at 119 (statement of then Assistant Attorney General Scalia), *reprinted in 1976 Leg. Hist.* at 125. However, conflict-of-interest principles are concerned with maintaining the appearance and actuality of impartiality in decisionmaking. Separation of powers, in contrast, concerns structuring the government "to protect the liberty and security of the governed" by "dispers[ing] the federal power among the three branches." *Metropolitan Washington Airports Authority*, 501 U.S. at 272. The remedy for a perceived conflict of interest is not a restructuring of the agency, but recusal of the person with a conflict from a particular case. NRA never requested the *ex officio* members to recuse themselves from this case for a conflict of interest, or for any other reason.

or views.[13] The court of appeals acknowledged that this Court has only found violations of separation of powers in cases in which Congress or its agents "possessed explicit voting or decisionmaking power that is not present here" (Pet. App. 15a), and it also agreed that the Constitution permits members of Congress to "advise, coordinate, and even directly influence an executive agency" through "oversight hearings, appropriation and authorization legislation, or direct communication with" the agency (Pet. App. 16a). Indeed, it is an accepted "political reality that 'members of Congress are requested to, and do in fact, intrude in varying degrees, in administrative proceedings.' " *DCP Farms v. Yeutter*, 957 F.2d 1183, 1188 (5th Cir.) (internal citation omitted), *cert. denied*, 113 S.Ct. 406 (1992).[14]

[13] Indeed, the Court has twice applied separation-of-powers analysis to federal commissions, including the Federal Election Commission, that include *ex officio* members from another branch, without treating the inclusion of the *ex officio* members as a factor relevant to the constitutional question. *Buckley v. Valeo*, 424 U.S. at 113 (The Commission "consists of eight members" including two "*ex officio* members . . . without the right to vote") and at 137 ("the ultimate question is which, if any, of those powers may be exercised by the present voting Commissioners"); *Mistretta*, 488 U.S. at 368 ("The Attorney General, or his designee, is an ex officio non-voting member" of the Sentencing Commission).

[14] The courts of appeals have found due process violations from congressional attempts to influence executive administrators only where there is substantial proof both of improper pressure on a decisionmaker and of prejudice to a party's rights in a particular case. *See, e.g., DCP Farms v. Yeutter*, 957 F.2d at 1187-88, and cases discussed therein; *Chemung County v. Dole*, 804 F.2d 216, 221-222 (2d Cir. 1986). The burden is especially heavy when, as here, the agency action is not adjudicatory. *See, e.g., Peter Kiewit Sons' Co. v. United States Army Corps of Engineers*, 714 F.2d 163, 169 (D.C. Cir. 1983). As the district court emphasized (Pet. App. 26a), NRA did not even try to make such a showing in this case. Indeed, there was nothing in the record before the court of appeals in this case indicating whether the *ex officio* members participated in, or were even present during, agency deliberations.

The court's only remaining basis for finding a constitutional violation here, then, is that the *ex officio* agents of Congress are designated by statute as members of the Commission (Pet. App. 14a-16a). However, this Court has repeatedly admonished that separation-of-powers analysis does not turn on labels,[15] and the separation-of-powers principle does not authorize courts to invalidate statutes out of a general wariness of Congress's ability to " 'mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments' " (Pet. App. 15a, quoting The Federalist No. 48, at 334 (J. Madison) (J. Cooke ed. 1961)). Instead, the "inquiry is focused on the 'unique aspects of the congressional plan at issue and its practical consequences,' " *Mistretta,* 488 U.S. at 393 (citation omitted), to ensure that " 'each of the three general departments of government [remains] entirely free from the *control* or *coercive influence,* direct or indirect, of either of the others,' " *id.* at 380 (emphasis added, quoting *Humphrey's Executor v. United States,* 295 U.S. 602, 629 (1935)). To that end, in every case where a statute has been alleged to violate the separation-of-powers principle, this Court has always found it necessary to analyze carefully the nature of the powers conferred upon Congress or its agents by the particular statute at issue. *See, e.g., Metropolitan Washington Airports Authority,* 501 U.S. at 276 ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it"); *Morrison v. Olson,* 487 U.S. at 694 ("Congress retained for itself no powers of control or supervision over an independent counsel"); *Bowsher v. Synar,* 478 U.S. at 732 ("[B]ecause Congress has retained removal authority over the Comptroller General, he may

[15] *Washington Metropolitan Airports Authority,* 501 U.S. at 267 (quoting *Mistretta,* 488 U.S. at 393); *Morrison,* 487 U.S. at 689.

not be entrusted with executive powers. The remaining question is whether the Comptroller General has been assigned such powers"); *Buckley v. Valeo,* 424 U.S. at 137 ("[T]he ultimate question is which, if any, of [the Federal Election Commission's] powers may be exercised by the present voting Commissioners").

Because it disregarded the analytic method established by these precedents, the court of appeals failed to ask the right questions, the answers to which show that 2 U.S.C. § 437c(a)(1) is constitutional. The court of appeals did not inquire whether the Act permits Congress, by its agents sitting *ex officio* and in a nonvoting capacity on the Commission, to exercise control or coercive power over the actions of this nonpartisan, independent agency. Nor did the court examine whether the mere presence of these *ex officio* members prevents the Executive Branch from accomplishing its assigned functions. Instead, the court simply conflated the constitutionally permissible opportunity to influence executive officials through sound advice with the unconstitutional power to exercise direct or indirect control over executive decisionmaking.

In sum, unlike the statute found unconstitutional in *Bowsher v. Synar,* 478 U.S. at 727, section 437c(a)(1) does not pose a "danger[ ] of congressional usurpation of Executive Branch functions." It does not " 'prevent[ ] the Executive Branch from accomplishing its constitutionally assigned functions,' " *Mistretta,* 488 U.S. at 383 (quoting *Nixon v. Administrator of General Services,* 433 U.S. 425, 443 (1977)). Nor does section 437c(a)(1) circumvent Article I procedures by according Congress or its agents the power to veto agency decisions, as in *INS v. Chadha,* 462 U.S. 919, 956-58 (1983), and *Metropolitan Washington Airports Authority,* 501 U.S. at 276. Instead, the Act "encourages the [Legislative and Executive] branches to work together without enabling either branch to bind or compel

the other. That is the way a government of divided and separated powers is supposed to work." *Ameron*, 809 F.2d at 998.

II. THE COMMISSION'S PAST ACTIONS SHOULD BE ACCORDED *DE FACTO* VALIDITY

Even if this Court concludes that the presence of *ex officio* members at the Commission is unconstitutional, the Court should reverse the judgment below. In *Buckley v. Valeo*, 424 U.S. at 142, this Court ruled that all Commission actions prior to the Court's decision should be accorded *de facto* validity even though the Court had invalidated the Commission's structure on separation-of-powers grounds. Respondents have not disputed the finding of the court of appeals (Pet. App. 17a, 16a) that "the unconstitutional *ex officio* membership provision can be severed from the rest of" the Act, so that "Congress is not even required after our decision . . . to amend the statute" in order to provide for the continuing administration of the Act by a reformed Commission. The Commission can thus continue, without congressional action, to administer and enforce the Act as before, but without the *ex officio* members. In these circumstances, the Respondents' claimed constitutional right to have the law enforced against them only at the behest of an agency satisfying separation-of-powers requirements would be fully protected if a reformed Commission makes a determination to pursue this case before the court of appeals proceeds to consider the merits of the statutory violation alleged. Such carefully tailored relief would provide Respondents with complete relief on their constitutional claim without undermining the public interest in the uninterrupted enforcement of the Act.

It is "well settled" that " 'where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.' " *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (quoting *McDowell v. United States*, 159 U.S. 596, 602 (1895)).[16] This *de facto* officer doctrine "was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently occupying government offices could later be invalidated by exposing defects in the officials' titles." *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981).[17]

As the court of appeals acknowledged (Pet. App. 17a), when this Court invalidated the Commission's original structure on separation-of-powers grounds in *Buckley v. Valeo*, 424 U.S. at 140-41, the Court in effect applied the *de facto* officer doctrine when it found the Commission's past actions to be *de facto* valid. At the time of *Buckley*,

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[16] The Court in *Glidden* ultimately declined to apply the *de facto* officer doctrine because the cases before it involved challenges to the designation by the courts below of non-Article III judges and thus affected the validity of the judgments under review. 370 U.S. at 536. There is no constitutional challenge here to either the structure or the jurisdiction of the district court that entered judgment against the Respondents. *See LaRouche v. FEC*, No. 92-1555, slip op. at 5 (D.C. Cir. July 8, 1994) ("*NRA*...dealt not with our authority to consider the FEC's enforcement action but with its authority to bring it").

[17] *See also, e.g., United States v. Royer*, 268 U.S. 394, 397 (1925); *Waite v. Santa Cruz*, 184 U.S. 302, 323 (1902); *Franklin Savings Ass'n v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1150 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1475 (1992); *National Ass'n of Greeting Card Publishers v. United States Postal Service*, 569 F.2d 570, 579 (D.C. Cir. 1976), *vacated on other grounds sub nom., United States Postal Service v. Associated Third Class Mail Users*, 434 U.S. 884 (1977); *Andrade v. Lauer*, 729 F.2d 1475, 1496-99 (D.C. Cir. 1984).

the Act provided for congressional officers to appoint four of the Commission's six *voting* members. *See* p. 4 *supra*. Despite the unconstitutional composition of this original Commission, the Court concluded that "the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date," 424 U.S. at 142. In fact, the Court went even further, finding that uninterrupted enforcement of the federal election campaign finance statutes was important enough to warrant permitting the Commission to continue to act *de facto* for a short period during which Congress could reconstitute the agency. "This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function *de facto* in accordance with the substantive provisions of the Act." *Buckley*, 424 U.S. at 143. When Congress reconstituted the Commission after the *Buckley* decision, it effectively incorporated this Court's ruling into the legislation, *see supra* p. 5 & n.2, thus clearly evidencing its intent that the uninterrupted enforcement of the Act be maintained even when the Commission itself must be modified to satisfy the Constitution.

The *Buckley* precedent requires recognition of the *de facto* validity of the Commission's prior actions in this case as well. Indeed, because it is undisputed here that the *ex officio* membership provision is severable from the remainder of the Act (Pet. App. 16a-17a), the Commission can proceed to administer the Act without the *ex officio* members in response to the Court's ruling without any need for the sort of stay utilized in *Buckley* to permit Con-

gress to reconstitute the agency.[18] The constitutional defect found by the court of appeals in this case can be remedied without congressional action because it is much more peripheral to the Commission's exercise of executive power than was true in *Buckley*, for here all of the Commission's decisions since 1976 have been made by majority vote of the six Commissioners appointed by the President, while before *Buckley* a majority of the Commissioners that had voted on the Commission's actions had been appointed by members of Congress. Thus, affording *de facto* validity to the Commission's prior actions here not only comports with congressional intent embodied both in the Act's severability clause, 2 U.S.C. § 454, and in the transitional provisions enacted when Congress reestablished the Commission after the *Buckley* decision, see p. 5 n.2, *supra*, but it compromises constitutional concerns in the circumstances of this case far less than it did in *Buckley*.

The court of appeals refused to apply the *de facto* officer doctrine here and instead simply reversed the district court's judgment against the Respondents without reviewing the merits. The *de facto* officer doctrine should be disregarded here, the court stated, because it would "foreclose any challenge to the authority of public officers" and " 'make it impossible for these [Respondents] to bring their assumedly substantial constitutional claim,' " Pet. App. 17a n.6 (quoting *Andrade v. Lauer*, 729 F.2d at 1498). The court was "aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case" (Pet. App. 18a).

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[18] The Commission actually took this action, subject to further review by this Court, immediately after the direction of the court of appeals. *See* p. 13, *supra*.

While the court's reasoning could be questioned on several other grounds,[19] the court's conclusion that it was required to grant NRA some relief in order to reach the constitutional issue does not justify its refusal to follow this Court's precedent in *Buckley* and accord the Commission's past actions *de facto* validity. As we have already shown, Respondents can be afforded full relief on their constitutional claim by delaying consideration of the merits of the case until the reconstituted Commission has an opportunity to decide whether to proceed with this civil law enforcement suit against them. *See* p. 26, *supra*.[20]

[19] The court's view that the *de facto* officer doctrine should simply be cast aside whenever necessary to reach a constitutional issue is contrary to the "deeply rooted" doctrine that courts "ought not to pass on questions of constitutionality...unless such adjudication is unavoidable." *Rescue Army v. Municipal Court*, 331 U.S. 549, 570 n.34 (1947) (quoting *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)). "Particularly where, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings." *American Foreign Service Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989). The court of appeals was also wrong in its supposition that refusal to treat a constitutional challenge to the Commission's composition as a valid defense to a civil law enforcement suit "would foreclose any challenge to the authority of public officers" (Pet. App. 17a n.6). Congress included in the Act a special provision for the litigation of such constitutional challenges in declaratory judgment actions, 2 U.S.C. § 437h, and this was the procedure under which this Court invalidated the composition of the original Commission in the *Buckley* decision.

[20] "A governmental body 'may effectively ratify what it could theretofore have lawfully authorized.' " *Sullivan v. Carrick*, 888 F.2d 1, 4 (1st Cir. 1989) (citation omitted). *See also Bowles v. Wheeler*, 152 F.2d 34, 40 (9th Cir.), *cert. denied*, 326 U.S. 775 (1945) ("[I]t appears settled law that 'the unauthorized bringing of an action may * * * be ratified by the person in whose name and on whose account it was brought so as to sustain the action from the beginning' " (citation omitted)); *Wirtz v. Atlantic States Constr. Co.*, 357 F.2d 442, 446 (5th Cir. 1966); *Andrade v. Regnery*, 824 F.2d 1253, 1256 (D.C. Cir. 1987).

If the reconstituted Commission were then to vote to proceed with the prosecution of the case, the Respondents would have no remaining constitutional right to avoid entry of judgment against them. *See* Fed. R. Civ. P. 25(d) (substitution of public officers) and Advisory Committee notes on the 1961 amendment ("Where the successor does not intend to pursue the policy of his predecessor which gave rise to the lawsuit, it will be open to him, after substitution, as plaintiff to seek voluntary dismissal of the action"). *See also* Fed. R. App. P. 43(c); Supreme Court R. 35.3.

Such a procedure would provide Respondents with all the relief necessary to protect their claimed constitutional rights, but would not give them the windfall of entirely escaping liability for violating the Act. It would also permit the reconstituted Commission to pick up where the former Commission left off and continue to administer and enforce the Act in an orderly manner, with respect to NRA and other alleged violators, just as this Court found appropriate in *Buckley*, 424 U.S. at 142-43.[21] Accordingly, if this Court holds unconstitutional the portion of

[21] Contrary to the apparent assumption of the court of appeals (Pet. App. 18a), *Harper v. Virginia Dep't of Taxation*, 113 S.Ct. 2510 (1993), does not foreclose such a carefully tailored remedy. *Harper* would require that a finding by this Court that inclusion of the *ex officio* members on the Commission violates the Constitution be applied in all other pending cases in which the issue is not procedurally barred. It would not preclude the Court from also applying the *de facto* officer doctrine to fashion an appropriate remedy in this case, and then granting the same remedy to others in similar circumstances. The one lower court that has thus far addressed the matter concluded that the reconstituted Commission could proceed with a civil enforcement action once it had "ratified its earlier finding that there was probable cause to believe a violation occurred and its subsequent decision to institute this action." *FEC v. National Republican Senatorial Comm.*, No. 93-1612 (D.D.C. Feb. 8, 1994).

section 437c(a)(1) providing for nonvoting *ex officio* members, the Court should, as in *Buckley v. Valeo*, 424 U.S. at 142, accord *de facto* validity to the Commission's past actions in administering and enforcing the campaign finance statutes and remand the case to the court of appeals with instructions to proceed to review the merits of the district court's judgment if the reconstituted Commission votes to continue pursuing this case.

III. THE COURT SHOULD NOT REACH THE OTHER ISSUES RAISED BY RESPONDENTS

Respondents filed no cross-petition for writ of certiorari. Nonetheless, in their brief in opposition, Respondents asked this Court to resolve three issues not presented by the Commission's petition. The court of appeals (Pet. App. 8a-12a) explicitly rejected Respondents' arguments on two of these issues (Opp. at i, questions 2 and 3). Their arguments concerning the third issue (*id.*, question 4), relating to the merits of the case, were rejected by the district court (Pet. App. 22a-24a, 33a), whose findings have not yet been reviewed by the court of appeals.

Respondents assert (Opp. 14) that these three issues represent alternative grounds for affirming the judgment below. However, none of these issues is a "necessary predicate to the resolution of the question[s] presented in the petition" for certiorari, *Caspari v. Bohlen*, 114 S.Ct. 948, 953 (1994), and this Court need not entertain any of them unless they are "of sufficient general importance to justify the grant of certiorari," *United States v. Nobles*, 422 U.S. 225, 241 n.16 (1975). Respondents have not claimed that the decisions of the lower courts on any of these issues are in conflict with the precedents of this Court or of any other lower court, nor have they shown any other reason why the resolution of these issues against them is "of

sufficient general importance" to warrant a grant of certiorari. Accordingly, the Court should decline to reach these issues.

A. The District Court's Decision on the Merits Does Not Warrant Review by This Court

Respondents summarily assert (Opp. 18-19) that the district court erred in finding that they violated the Act. The district court's decision rested, however, on a straightforward application of the statutory terms and the Commission's regulations to the particular facts of this case. The court's findings were in accord with the Commission's expert construction of the statute, a construction entitled to substantial deference. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The court's decision was also supported by the Commission's duly promulgated regulation, 11 C.F.R. § 114.5(b)(3), and by judicial precedent. *See Pipefitters v. United States*, 407 U.S. 385, 414 (1972) (holding that the statute requires "strict segregation" of corporate or union money from that of a separate segregated fund); *AFL-CIO v. FEC*, 628 F.2d 97, 99-100 (D.C. Cir.) (section 441b is violated when a union transfers back to its separate segregated fund, prior to an election, money that was previously transferred from the fund to the union), *cert. denied*, 449 U.S. 982 (1980).

The district court's unexceptional application of these precedents to the undisputed facts of this case plainly does not warrant review by this Court. Even if it did, however, such a review would be premature here since the district court's decision has not yet been reviewed by the court of appeals.

B. Respondents' Argument Concerning the President's Removal Authority Is Both Meritless and Premature

Respondents maintain (Opp. 14) that the Act violates separation-of-powers requirements because it contains no provision governing the President's authority to remove agency members. This Court has long recognized Congress's authority to create independent agencies and " 'fix the period during which [their members] shall continue in office, and to forbid their removal except for cause in the meantime,' " *Morrison*, 487 U.S. at 687 (quoting *Humphrey's Executor*, 295 U.S. at 629). The Court has also acknowledged that any statutory limits on the presidential power to remove certain executive officials might be constitutionally suspect. *Morrison*, 487 U.S. at 690.[22] But neither this Court, nor any lower court, has ever remotely suggested that the absence of any statutory provision governing the President's removal power would be unconstitutional. To the contrary, in *Bowsher v. Synar*, 478 U.S. at 725 n.4, this Court cited the absence of any provision in the Federal Election Campaign Act "specify[ing] a removal procedural" for Commissioners as being typical of "[t]he statutes establishing independent agencies,"

[22] Respondents argue (Opp. 16) that the President lacks the mechanism to control the Commission that the Attorney General could use to limit the independent counsel in *Morrison*, 487 U.S. at 696. However, this Court has never found such special provisions for continuing presidential control to be constitutionally required for independent agencies whose members, unlike the independent counsel, are appointed by the President. *See Morrison*, 487 U.S. at 687 (recognizing " '[t]he authority of Congress' " to create agencies and " 'to require them to act in discharge of their duties independently of executive control' ") (quoting *Humphrey's Executor*, 295 U.S. at 629); *id.* at 690 n.28 ("the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree").

which the Court contrasted with the unconstitutional features of the removal provision in the case before it.

Respondents in effect ask this Court to *infer* from statutory silence some unstated limits on the President's power to remove Commissioners, and then to hold not only the inferred limits, but also the Commission as a whole, unconstitutional as a result. However, this Court has always required that ambiguous statutes be construed in a manner that avoids, rather than creates, such constitutional issues, *see, e.g., Morrison*, 487 U.S. at 682, and the lower courts have applied this principle by construing such silence in similar statutes to permit presidential removal for cause. *SEC v. Blinder, Robinson, & Co.*, 855 F.2d 677 (10th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989); *SEC v. Bilzerian*, 750 F.Supp. 14 (D.D.C. 1990).

In any event, until a President seeks to remove a Commissioner this Court has occasion to anticipate whether, or to what extent, the Act should be construed to limit the President's removal power. Accordingly, this issue is not even ripe for consideration on the facts of this case. *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1392-93 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987).

C. Respondents' Argument Concerning the Commission's Bipartisan Composition Is Both Meritless and Premature

The provision in 2 U.S.C. § 437c(a)(1) that "no more than 3 [of the six] members of the Commission" appointed by the President "may be affiliated with the same political party" simply sets the necessary qualifications for the members of a bipartisan agency. Although the President is entitled, pursuant to Article II, § 2, cl. 2 of the Constitution, to choose the individuals to nominate as Commissioners, it has long been recognized that "it is entirely

proper for Congress to specify the qualifications for an office that it has created." *Bowsher v. Synar*, 478 U.S. at 740 (Stevens, J., concurring). *See also Myers v. United States*, 272 U.S. 52, 266-274, nn.35, 36 (1926) (Brandeis, J., dissenting). Such bipartisanship requirements have long been common for independent agencies,[23] and this Court has recognized the special value of an "inherently bipartisan" agency to "decide [the] issues charged with the dynamics of party politics" that fall within the Commission's jurisdiction. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. at 37. Respondents cite no authority to support their argument (Opp. 17-18) that this long-established legislative practice might be unconstitutional.

In fact, nothing in the Act suggests that the bipartisanship requirement is a judicially enforceable legal restriction on the President's power to nominate individuals to become Commissioners, rather than a directory provision enforceable only through the Senate's confirmation power. The Executive Branch has repeatedly opined that such provisions are merely "advisory," *Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990*, 25 Weekly Comp. Pres. Doc. 1851, 1852 (Nov. 20, 1989), and thus do "not constrain the President's constitutional authority to appoint officers of the United States," *Statement on Signing the Cranston-Gonzalez National Affordable Housing Act*, 26 Weekly Comp. Pres. Doc. 1930, 1931 (Nov. 28, 1990). Such a construction, which is plainly

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[23] Congress has enacted bipartisan structures for, *e.g.*, the Securities & Exchange Commission, 15 U.S.C. § 78d(a); the Federal Trade Commission, 15 U.S.C. § 41; the Federal Energy Regulatory Commission, 42 U.S.C. § 7171(b); the Equal Employment Opportunity Commission, 42 U.S.C. § 2000e-4(a); the Interstate Commerce Commission, 49 U.S.C. § 10301(b); and the United States Sentencing Commission, 28 U.S.C. § 991(a), which was found constitutional in *Mistretta v. United States*, 488 U.S. 361 (1989).

a permissible one under the language of the Act, could be adopted if a legally binding restriction were found unconstitutional. *See supra* p. 35.

Like Respondents' other issues, however, this one is not ripe for decision on the facts of this case. As the court of appeals suggested (Pet. App. 11a), it might be that such an issue would be presented if a President appointed more than three Commissioners who were affiliated with one party and such a Commission's authority to enforce the Act were challenged. But all six of the Commissioners who participated in this case were nominated by the President and confirmed by the Senate, no one has challenged their conformity to the qualifications in 2 U.S.C. § 437c(a)(1), and the presidential statements cited above indicate that the Presidents who appointed them have not considered their nominations to be legally restricted by bipartisanship provisions. In this context, resolution of this question of statutory construction would have no effect on the outcome of this case. Thus, like the other issues presented by the Respondents in their Opposition, this issue should not be considered by the Court.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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No. 93-1151

In The

Supreme Court of the United States

October Term, 1994

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

NRA POLITICAL VICTORY FUND, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Federal Election Commission lacks authority to bring this enforcement action on the ground that section 437c(a)(1) of the Federal Election Campaign Act violates the separation of powers by directing that the Secretary of the Senate and the Clerk of the House of Representatives (or their designees) shall serve as *ex officio*, nonvoting members of the Commission.

2. Whether the Federal Election Commission lacks authority to bring this enforcement action on the ground that the Federal Election Campaign Act unconstitutionally interferes with the President's duty to "take Care that the Laws be faithfully executed" by vesting law enforcement authority in principal officers over whom the President has no removal authority.

3. Whether the Federal Election Commission lacks authority to bring this enforcement action on the ground that section 437c(a)(1) of the Federal Election Campaign Act, which provides in part that "[n]o more than 3 members of the Commission . . . may be affiliated with the same political party," is an unconstitutional infringement upon the President's power under Article II, section 2, clause 2 of the Constitution to nominate principal officers who perform executive functions.

RULE 29.1 STATEMENT

In accordance with Rule 29.1 of the Rules of this Court, respondents are the National Rifle Association – Institute for Legislative Action ("ILA"), the NRA Political Victory Fund ("PVF"), and Grant Wills, Treasurer of the PVF. ILA is a component of the National Rifle Association, Inc., and the PVF is a separate segregated fund organized under section 441b(b)(2)(c) of the Federal Election Campaign Act. There are no other parent or subsidiary companies.

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On Writ Of Certiorari
To The United States Court Of Appeals
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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Uniquely among the myriad executive and independent agencies and commissions created by Congress, the Federal Election Commission ("FEC" or "Commission") counts among its membership two congressional agents – the Secretary of the Senate ("Secretary") and the Clerk of the House of Representatives ("Clerk"), or their designees. *See* 2 U.S.C. § 437c(a)(1).[1] Prior to the 1976 amendments to the FECA, the Commission consisted of eight members: the six voting members were appointed – two each by the President *pro tempore* of the Senate, the

[1] This provision is part of the Federal Election Campaign Act ("FECA" or "the Act"), 2 U.S.C. § 431 *et seq.*

Speaker of the House of Representatives, and the President – and the Secretary and the Clerk were *ex officio* members without the right to vote.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that these constitutive provisions violated the Appointments Clause[2] of the Constitution insofar as the Commissioners were charged with performing executive functions. *Id.* at 140-41. The separation of powers challenge in *Buckley*, however, was directed only at the four congressionally appointed, voting members of the Commission, so the Court did not address the constitutional status of the *ex officio* members. Following *Buckley*, Congress reconstituted the FEC such that it is now "composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate." 2 U.S.C. § 437c(a)(1). Congress thus left intact the provision of the original statute placing two of its agents on the Commission.[3] The central issue in this

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[2] U.S. Const. Art. II, § 2, cl. 2.

[3] While this Court's holding in *Buckley* did not require Congress to reconsider its decision to place these *ex officio* members on the FEC, Congress was not unaware of their contested constitutional status. Testifying before a Senate subcommittee in the wake of *Buckley*, then-Assistant Attorney General for the Office of Legal Counsel Antonin Scalia noted the Ford Administration's view that the nonvoting, *ex officio* members ought not be restored to the reconstituted Commission:

> We believe that the spirit of the [*Buckley*] opinion, and even the letter of the Constitution, require this result. The connection of these two officers to the legislative branch is even closer than that of the present congressionally appointed members who have the right to vote. They are not only *appointed* by Congress, but *paid* by it and *removable* by it. We believe that the absence of voting power is not determinative for constitutional purposes. The power to be present and to participate in discussions is the power to influence.

Federal Election Campaign Act Amendments: Hearing Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 94th Cong., 2d Sess. 119 (1976) (emphasis in original). Congress plainly took note of – though it did not heed – the Administration's warning. *See, e.g.*, 122 Cong. Rec. 6940 (1976) (Sen. Griffin).

case is whether that provision violates the Constitution's separation of powers.

1. In March and July 1988, respondent National Rifle Association Political Victory Fund ("PVF"), a separate segregated fund established by the National Rifle Association ("NRA") pursuant to section 441b(b)(2)(C) of the Act, made two nationwide mailings to NRA members to solicit contributions. Joint Appendix ("J.A.") 29. Another component of the NRA, respondent NRA-Institute for Legislative Action ("ILA"), which operates from a bank account separate and segregated from both the NRA and the PVF and is prohibited by the NRA's bylaws from making political contributions, J.A. 26, issued a series of checks to vendors to cover the production and postage costs associated with these two mailings by the PVF; ILA paid a total of $415,744.72 to cover expenses associated with the mailings. J.A. 29-31. Under the Act, a corporate entity such as the ILA, while generally prohibited from making contributions in connection with any federal election, *see* 2 U.S.C. § 441b(a), may pay for solicitation expenses incurred by a separate segregated fund such as PVF. *See* 2 U.S.C. § 441b(b)(2)(C).

On August 1, 1988, the PVF reimbursed the ILA for the $415,744.72 of costs for the March and July 1988 PVF solicitation mailings that had been paid by the ILA. J.A.

31. On October 20, 1988, after Grant A. Wills, the Treasurer of the PVF, the Fiscal Officer of the ILA, and a respondent in this case, determined that the PVF had prematurely decided to reimburse the ILA, the ILA returned the entire amount of the reimbursement to the PVF. J.A. 31. Respondent Wills believed that because the PVF was under no obligation to reimburse the ILA for the payments in the first instance, there could be no prohibition against the ILA subsequently returning that reimbursement to the PVF. J.A. 31-32. The PVF duly reported the October 20, 1988, transaction to the FEC, whereupon the Commission began the administrative proceedings that led ultimately to this case. J.A. 32.

2. In October, 1989, the Commission found "reason to believe," 2 U.S.C. § 437g(a)(2), that the October 20, 1988, return of the reimbursement from the ILA to the PVF violated the Act's prohibition against corporate contributions. 2 U.S.C. § 441b(a); *see* J.A. 9. After further investigation, the FEC ruled on April 24, 1990, that there was probable cause to believe that such a violation had occurred. J.A. 10. When conciliation efforts failed, the Commission voted on September 18, 1990, to initiate this civil enforcement action against respondents. J.A. 10. The Complaint was filed on December 20, 1990. J.A. 13.

3. Respondents asserted both statutory and constitutional defenses to the FEC's allegations. J.A. 14-22. Specifically, respondents' denied that their conduct had violated the statute and contended that, in any event, the FEC lacked constitutional authority to maintain this enforcement action because (1) the membership of the *ex officio* congressional members on the Commission violates the separation of powers doctrine, J.A. 16-17; (2) the Commission's statutory bipartisan appointment requirement violates the Appointments Clause, J.A. 17; and (3)

the establishment of an agency with executive enforcement authority whose members are not subject to removal by the President violates the separation of powers. J.A. 17. On cross-motions for summary judgment, the district court held that the October 20, 1988, transaction constituted a corporate contribution prohibited by section 441b(a), and either rejected or refused to address respondents' constitutional defenses. Appendix to the Petition ("Pet. App.") 19a-28a. On December 11, 1991, the district court ordered that the respondents pay a civil penalty in the amount of $40,000. Pet. App. 35a.

4. On October 22, 1993, the United States Court of Appeals for the District of Columbia Circuit reversed, Pet. App. 1a-18a, holding that the FEC's composition violates the separation of powers.[4] The court concluded that the challenge to the bipartisan appointment requirement is nonjusticiable, and it rejected on the merits the claim based on the Commission's independence from executive control. With respect to the FEC's ex officio congressional members, however, the court of appeals

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[4] By deciding the constitutional issues before addressing respondents' statutory argument, the court of appeals knowingly departed from the general rule that federal "courts should 'refrain from passing on the constitutionality of an act of Congress unless obliged to do so.'" Pet. App. 4a (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919))). The FEC does not challenge this aspect of the decision. Moreover, the court of appeals was correct in holding that this "prudential rule of avoiding constitutional questions," *Zobrest v. Catalina Foothills School Dist.*, 113 S.Ct. 2462, 2466 (1993), does not apply when, as in this case, "plaintiffs challenge[] the constitutional composition or character of a tribunal . . . . " Pet. App. 5a (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 859 (1986), and *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56, 87 (1982)).

held that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution." Pet. App. 15a. While acknowledging that Congress "enjoys ample channels to advise, coordinate, and even directly influence an executive agency," Pet. App. 16a, the court concluded: "What the Constitution prohibits Congress from doing, and what Congress does in this case, is to place its agents beyond the legislative sphere by naming them to membership on an entity with executive powers." Pet. App. 16a.

The court of appeals then rejected the Commission's argument, based upon *Buckley*, that the court ought to validate, under the *de facto* officer doctrine, the Commission's constitutionally unauthorized actions taken in connection with this enforcement action. Noting that respondents' constitutional challenge arises as a defense to a civil enforcement action, the court held that it was "aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case." Pet. App. 18a.

The FEC filed a petition for a writ of certiorari on January 18, 1994. The Court granted the petition on June 20, 1994.

SUMMARY OF ARGUMENT

1. As an initial matter, respondents are bound to note that the petition for certiorari in this case may have been filed jurisdictionally out-of-time. While the petition was filed by the FEC within the statutory time limit, the Solicitor General did not authorize the filing until some four months after that deadline had passed. If the Solicitor General is right that the FEC may not represent itself before this Court without his authorization, then we believe that the petition was not timely filed.

2. The court of appeals correctly held that the statutorily mandated *ex officio* membership of the Secretary and the Clerk on the Commission – though only in a nonvoting capacity – violates the separation of powers. By placing these congressional agents on an agency performing executive functions, Congress unconstitutionally encroached on the Executive's domain. Because the FEC thus lacked constitutional authority to prosecute this enforcement action, this case must be dismissed.

3. Both the FEC and the Solicitor General argue that even if this Court concludes that the Commission has no constitutional authority to prosecute this enforcement action, the Court should nonetheless "validate" the FEC's actions against respondents and uphold the district court's assessment of civil penalties. Three distinct theories are invoked in support of this extraordinary contention. First, they argue that this Court should apply any ruling of unconstitutionality purely prospectively, such that it will not even apply to the parties now before the Court. As we show at length, this claim, which is premised primarily upon a misreading of *Buckley v. Valeo*, 424 U.S. 1 (1976), is incompatible both with the fundamental commands of Article III and with this Court's recent cases concerning the retroactivity of judicial decisions.

In addition, the FEC and the Solicitor General argue that the Court should deem the Commission's prior actions valid under the *de facto* officer doctrine. That doctrine does not apply, however, where the putative government officer occupies an office created by an unconstitutional act, and in any case, the doctrine does not preclude a court from addressing a substantial constitutional claim.

Finally, the FEC argues that it should simply be allowed to reconstitute itself without the *ex officio* members, ratify its prior invalid actions and continue the prosecution of this enforcement action against respondents. But a reconstituted FEC may not ratify its prior actions in this enforcement action because, under venerable principles of ratification law, a successor in office that did not legally exist at the time the contested actions were taken may not ratify the actions of an unconstitutional predecessor.

Accordingly, if the Court holds that the FEC lacked constitutional authority to prosecute this enforcement action, the Court's ruling must be applied in this case, and this action must be dismissed.

4. In the event the Court holds that the presence of the *ex officio* congressional agents on the FEC does not violate the Constitution, there are two other constitutional obstacles (both presented to and ruled on by the court of appeals) to the Commission's prosecution of this action. Although the Commission possesses certain quintessentially executive powers, it is not subject to control by the President because the FECA does not provide the President with any removal authority over Commissioners. The FECA thus violates the mandate of Article II that the President "shall take Care that the Laws be faithfully executed." Moreover, because the Constitution grants Congress "no role whatsoever," *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring), in determining whom the President may nominate to serve as a principal officer, the FECA's requirement that the membership of the Commission be perfectly bipartisan violates the President's authority under the Appointments Clause. For these additional reasons, the FEC is unconstitutional, and this case must be dismissed.

ARGUMENT

I. The Petition for a Writ of Certiorari May Have Been Filed Jurisdictionally Out-Of-Time

We are obliged at the threshold to call the Court's attention to the possibility that it lacks jurisdiction to decide this case. The FEC filed its petition for a writ of certiorari in this case on January 18, 1994, the 88th day of the 90-day time period within which a petition could be filed. By order dated March 21, 1994, this Court, on its own motion, invited the United States to file a brief addressing "[w]hether the [FEC] has statutory authority to represent itself in this case in this Court." The United States responded that under 28 U.S.C. § 518(a), the FEC may represent itself only if authorized to do so by the Solicitor General, but that the Solicitor General had, by letter dated May 26, 1994, provided the necessary authorization. Brief for the United States as Amicus Curiae (May 1994) ("U.S. Br. (May 1994)") at 13-14. This authorization did not come until over 120 days after the deadline for the filing of the petition for a writ of certiorari had passed. It is clear that the statutory time limit for filing a certiorari petition in a civil case is jurisdictional and cannot be waived by the parties or by the Court. *See Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

The Court's decision to grant the FEC's petition can be interpreted in either of two ways. First, the Court may have agreed with the FEC that the FEC has independent authority to represent itself before the Court. If so, no question concerning this Court's jurisdiction arises, for the FEC's petition was timely filed. Alternatively, the Court may have considered the Solicitor General's May 26, 1994, "authorization" letter to have obviated the need to resolve the underlying issue of the FEC's independent authority. If the latter is the case, we believe that the Court must resolve the underlying issue, for the Solicitor

General's after-the-fact "authorization" of the FEC's filing, we submit, came too late to be effective.

The question is whether the Solicitor General's attempted ratification relates back to the date of the filing of the FEC's petition. Well-settled principles governing the law of ratification require a negative answer. The governing rule is stated concisely in the Restatement (Second) of the Law of Agency: "If an act to be effective in creating a right against another or to deprive him of a right must be performed before a specific time, an affirmance is not effective against the other unless made before such time." Restatement (Second) of Agency § 90 (1957). The comments to this section make clear that "[t]he bringing of an action, or of an appeal, by a purported agent cannot be ratified after the cause of action or right to appeal has been terminated by lapse of time." *Id.* cmt. a.; *see also Wagner v. Globe*, 722 P.2d 250, 255 (Ariz. 1986). This Court long ago recognized, albeit in another context, the principle underlying this rule: "The intervening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made.*" *Cook v. Tullis*, 85 U.S. (18 Wall.) 332, 338 (1874) (emphasis added). Here, there is no question that the Solicitor General could not have filed a certiorari petition on May 26, 1994, four months late.[5]

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[5] If the Solicitor General is empowered to retroactively authorize an otherwise unauthorized petition for certiorari after the filing deadline has passed, he would, in effect, be empowered unilaterally to extend by days, weeks, or even months the statutory deadline for filing certiorari petitions. Such a result would be inconsistent with the need for "bright-line" rules, easily applied, governing the time limits for invoking this Court's jurisdiction. *Cf. Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202 (1988) ("The time of appealability, having jurisdictional consequences, should above all be clear.").

Accordingly, should the Court decide that the FEC lacks authority to represent itself before this Court (and we endorse the Solicitor General's submission on this issue), it should also decide that the Solicitor General's attempt to authorize retroactively the FEC's filing is invalid, and that the petition should therefore be dismissed for lack of jurisdiction. *Cf. United States v. Providence Journal Co.*, 485 U.S. 693, 699 (1988).[6]

II. The Court of Appeals Correctly Held That the Composition of the FEC Violates the Constitution's Separation of Powers.

1. Put starkly, the constitutional issue posed by the *ex officio*, nonvoting membership of the Secretary and the Clerk on the FEC is this: Is the Congress constitutionally free to place its agents at conference tables throughout the executive branch and in the independent agencies, not just to eavesdrop, but to participate fully and directly in the agency's internal deliberations concerning purely

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[6] Apparently recognizing the timeliness issue presented by his attempted retroactive authorization, the Solicitor General cites two cases as support for the action. U.S. Br. (May 1994) at 13-14. Neither case, however, is on point. The first, *United States v. Winston*, 170 U.S. 522 (1898), did not involve a jurisdictional question at all, but rather dealt with whether a district attorney who represented the government in an appellate proceeding when authorized to do so by the Attorney General was entitled to extra compensation. And in *Hogg v. United States*, 428 F.2d 274, 277-80 (6th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), the court of appeals held that a United States Attorney *did* have authority to file a notice of appeal without the explicit authorization of the Solicitor General.

executive functions? We, joined now by the Solicitor General, Brief for the United States as Amicus Curiae ("U.S. Br.") at 9-23, respectfully submit that the answer to this question must surely be no.

In *Buckley*, this Court emphasized that certain functions statutorily assigned to the FEC are purely executive in nature. The Commission's civil law enforcement authority, for example, is quintessentially and exclusively an executive function:

> The [FEC's] enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3.

Buckley, 424 U.S. at 138.[7]

Because the Commission performs certain purely executive functions, there is no doubt, and the Commission does not dispute, that Congress could not have

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[7] In addition to these enforcement responsibilities, the *Buckley* Court held that each of "the Commission's broad administrative powers," including "rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself . . . represents the performance of a significant governmental duty exercised pursuant to a public law." *Buckley*, 424 U.S. at 140-41. "These administrative functions may . . . be exercised only by persons who are 'Officers of the United States.'" *Id.* at 141. At the same time, the Court held that the FEC also performs some nonexecutive tasks that are entirely consistent with the legislative function, and which may thus be performed by an FEC that includes congressional agents. *See id.* at 138. The instant enforcement action plainly implicates the FEC's executive duties.

designated its agents as voting members of the Commission. *Buckley*, 424 U.S. at 141; *Bowsher v. Synar*, 478 U.S. 714, 722-727 (1986) (congressional agent, the Comptroller General, may not be authorized to execute law); *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) ("*MWAA*") ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it.").

Nor can there by any doubt that in installing two congressional agents as members of the FEC, Congress intended to influence the Commission's performance of its functions, including its executive functions. The legislative history of the FECA, which is recounted in the Solicitor General's brief, U.S. Br. at 12-14, makes this clear. So does common sense. As the court of appeals noted, "we cannot conceive why Congress would wish or expect its officials to serve as *ex officio* members if not to exercise *some* influence." Pet. App. 13a (emphasis in original).

2. The Commission defends the *ex officio* members as a salutary congressional effort to facilitate interbranch dialogue and cooperation. The presence of the *ex officio* commissioners, says the FEC, merely provides an opportunity "for members of one branch to seek to influence another branch's exercise of its own constitutional powers by the mere persuasiveness of their advice or views." Brief for Petitioner Federal Election Commission ("FEC Br.") at 22-23. According to the Commission, the membership of the congressional agents on the Commission would violate the separation of powers only if they were empowered to "exercise control or coercive power over the actions" of the agency or could otherwise "prevent[ ] the Executive Branch from accomplishing its assigned functions." *Id.* at 25.

To be sure, this Court's separation of powers decisions have made clear that the Constitution forbids

arrangements in which Congress seeks to exercise determinative or coercive authority over executive functions.[8] But nothing in those decisions suggests that such coercive influence is a *sine qua non* of a constitutional violation. To the contrary, this Court has always been alert to the natural tendency of one branch to encroach on the domain of another. "It is this concern of encroachment and aggrandizement that has animated [the Court's] separation-of-powers jurisprudence and aroused [its] vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.' " *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (quoting *Chadha*, 462 U.S. at 951.) And Congress, as the Founders understood, "can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." The Federalist No. 48, at 334 (J. Cooke ed. 1961).

Under the FEC's "control or coerce" theory of the separation of powers, Congress is constitutionally free to insinuate its agents into the innermost precincts of the executive branch, to participate fully in internal deliberations concerning executive functions, and "to influence executive officials through sound advice."[9] FEC Brief at

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[8] *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983) (legislative veto); *Bowsher v. Synar*, 478 U.S. 714 (1986) (statutory budget reduction authority granted to congressional agent); *MWAA*, 501 U.S. at 259-60 (members of Congress with veto power over decisions made by Airport Authority).

[9] The statutory advice-giving function vested in the *ex officio* members of the FEC may well be a function that only an "Officer of the United States" can perform. *See Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 438, 465-67 (1989); *Buckley*, 424 U.S. at 125-138. If so, then the statutory membership of the Secretary and the Clerk on the FEC violates the Appointments Clause. *See id.*; U.S. Br. at 22, n.18.

25. The FEC has suggested no principled basis for stopping Congress' authority to promote interbranch dialogue short of the President's Cabinet table. Nor can the FEC's logic be confined to the executive branch. Congress has a legitimate role in monitoring the interpretation and application of federal law and, in any case, it is responsible for authorizing and appropriating funds for the federal courts. Presumably Congress, if the FEC is right, could require that one of its agents, nonvoting to be sure, sit in on this Court's deliberations.

These hypotheticals expose the fundamental flaw in the FEC's theory: encroachment does not necessarily require coercion. To the contrary, "[t]he general rule is that neither department may *invade the province* of the other *and* neither may control, direct, or restrain the action of the other." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (emphasis added).

Nor is Congress' invasion of the Executive's domain by placing its agents on the FEC justified by its interest in promoting interbranch dialogue and information-gathering. As the court of appeals noted, "Congress enjoys ample channels to advise, coordinate, and even directly influence an executive agency. It can do so through direct oversight hearings, appropriation and authorization legislation, or direct communication with the Commission." Pet. App. 15a-16a (footnote omitted).[10] In any event, in *MWAA* the Court emphatically rejected a similar argument for pragmatism and flexibility in separation of powers analysis: "One might argue that the provision for

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[10] Indeed, the Act explicitly safeguards these congressional prerogatives. *See* 2 U.S.C. § 437c(b)(2) ("Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.").

a Board of Review is the kind of practical accommodation between the Legislature and the Executive that should be permitted in a 'workable government.' " *MWAA*, 501 U.S. at 276 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Despite the possibility that the congressional Board of Review "might prove to be innocuous," the *MWAA* Court instead saw in that arrangement "a blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role," and so held that the statute violated the separation of powers. *Id.*

Precisely the same analysis applies to the statutorily mandated placement of congressional agents on federal agencies that perform executive functions. The Commission's only argument in support of the constitutionality of the *ex officio* nonvoting membership of congressional agents on the FEC is that the arrangement is "innocuous." The court of appeals, however, properly applied this Court's precedents in holding that the Constitution does not permit such congressional incursions into the executive sphere.

3. The FEC's separation of powers theory is also at odds with related constitutional principles and doctrines. First, acceptance of the FEC's position would clearly threaten the viability of the executive privilege. This privilege, which "derive[s] from the supremacy of each branch within its own assigned area of constitutional duties," *United States v. Nixon*, 418 U.S. 683, 705 (1974), "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708. Simply put, a statutory arrangement (like the composition of the FEC) that grants congressional officers automatic and unlimited access to all papers and conversations by executive decisionmakers necessarily and seriously threatens the executive branch's

ability to "protect[] . . . the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Id.* While the court of appeals did not rely upon this rationale, this incursion on executive privilege further supports that court's ruling.

Second, there is no doubt that Congress could not place one of its members on the Commission or in any other position exercising executive authority. The Incompatibility Clause establishes a rigid and impermeable partition between the executive and legislative branches with respect to service of members of Congress in executive positions: "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. Art. I, § 6, cl. 2. This express prohibition on direct, personal participation by members of Congress in executive functions could be substantially evaded if, as the FEC maintains, Congress is constitutionally free to place its agents in agencies performing executive functions.[11] *See Bowsher*, 478 U.S. at 726

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[11] While the principal purpose of the Incompatibility Clause appears to have been to prevent a repetition of the corruption occurring in 18th-century British government, its importance to the doctrine of separation of powers was understood by the Founders. In responding to the James Madison's suggestion that the clause should exclude legislators only from offices established during their service in Congress (thus allowing members to serve concurrently in all other offices), Elbridge Gerry remarked:

> It appears to me that we have constantly endeavored to keep distinct the three great branches of government; but if we agree to this motion, it must be destroyed by admitting the legislators to share in the executive, or to be too much influenced by the executive, in looking up to him for offices.

1 The Records of the Federal Convention of 1787, 393 (M. Farrand ed., rev. ed. 1987) (June 23, 1787).

("The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.").

Finally, we agree with the Solicitor General's point that participation of congressional agents in executive deliberations regarding law enforcement issues is in tension with the Founder's determination, as reflected in the Bill of Attainder Clause, U.S. Const. Art. I, § 9, cl. 3, to separate the legislative power to make generally applicable laws from the executive power to apply those laws to specific factual circumstances. *See* U.S. Br. at 21-22.

For the foregoing reasons, the court of appeals correctly concluded that the statutory designation of the Secretary and the Clerk as *ex officio* nonvoting members of the Commission impermissibly encroaches on the domain of the Executive. Accordingly, the Commission lacks constitutional authority to prosecute this enforcement action.

III. Because the Commission Lacked Constitutional Authority To Bring This Enforcement Action, the Action Must Be Dismissed.

The Commission's fall-back position is that the outcome of this case is not controlled by the merits of respondents' constitutional challenge to its composition – in other words, the Commission wins no matter how this Court decides the separation of powers issue. Even if "the Commission lacks authority to bring this enforcement action," as the Court of Appeals held, Pet. App. 2a, this Court, says the FEC, should nonetheless declare the enforcement action valid and affirm the judgment of the district court assessing a $40,000 civil penalty against respondents. The Commission is joined in this argument by the Solicitor General, who urges the Court to "accord de facto validity to the Commission's prior actions" in

this case, despite their acknowledged unconstitutionality. U.S. Br. at 28.

In support of this startling proposition, both the Commission and the Solicitor General (collectively referred to as the "government") rely on two distinct, though related, lines of cases – the so-called "de facto officer" cases and cases relating to the principle of "purely prospective" application of this Court's "new" constitutional rulings. In the same vein, the FEC argues that a validly reconstituted FEC will be free simply to ratify its unconstitutional predecessor's decisions and continue to prosecute this enforcement action. As we demonstrate below, however, there is no precedent supporting the Government's claim that respondents are entitled to no relief whatsoever for their proven constitutional injury.[12] We turn first to the issue of retroactivity.

A. A Ruling By This Court That the FEC Is Unconstitutionally Composed Must Be Applied to the Parties in This Case.

1. This Court's jurisprudence concerning the retroactive application of decisions announcing "new" constitutional rulings has undergone a sweeping overhaul in recent years. The Court's experiment with "prospective" decisionmaking began almost 30 years ago, in *Linkletter v. Walker*, 381 U.S. 618 (1965), which held that the case extending the Fourth Amendment exclusionary rule to state criminal prosecutions, *Mapp v. Ohio*, 367 U.S. 643 (1961), would not be applied retroactively to a state conviction that had become final before *Mapp* was decided. The following year, the Court extended its nonretroactivity analysis to convictions pending on direct appellate review, *see Johnson v. New Jersey*, 384 U.S. 719 (1966), and shortly thereafter extended it to the civil law arena. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

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[12] See note 24, infra.

Now, as we discuss below, the Court has come almost full circle, holding in a series of recent cases that nonretroactive adjudication is rarely consistent with "the nature of judicial review." Throughout the Court's sojourn into the field of prospective decisionmaking, however, one principle has remained constant and unquestioned: In a case brought by a government agency to enforce federal penalties for a violation of federal law, any new constitutional ruling announced in the case must be applied to the defendant before the Court. No decision of this Court has ever deviated from this principle; indeed, no Member of this Court has ever questioned it.[13] And it is directly at odds with the government's request in this case that the Court deny respondents any remedial benefit of a favorable ruling on their separation of powers challenge to the Commission's *ex officio* members. A survey of this Court's recent retroactivity cases makes this clear.

2. The Court's rethinking of prospective decisionmaking began in the criminal law area. The issue in *Griffith v. Kentucky*, 479 U.S. 314 (1987), was whether the rule announced in *Batson v. Kentucky*, 476 U.S. 79 (1986), concerning racial discrimination in the prosecution's use of peremptory challenges should be applied retroactively to convictions pending on direct review when *Batson* was decided. A majority of the Court overruled *Linkletter*, holding that any new constitutional ruling for the conduct of criminal prosecutions, such as *Batson*, must be applied retroactively to all cases pending on direct review when the new ruling was announced.

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[13] *See Illinois v. Krull*, 480 U.S. 340, 368 (1987) ("While the extent to which our decisions ought to be applied retroactively has been the subject of much debate among Members of the Court for many years, there has never been any doubt that our decisions are applied to the parties in the case before the Court.") (O'Connor J., dissenting) (citations omitted).

In so holding, the Court adopted Justice Harlan's view that prospective decisionmaking violates two "basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322. First, retroactive decisionmaking is the defining feature of the judicial function; prospective lawmaking is the role of the legislature. The "nature of judicial review" under Article III of the Constitution is to adjudicate specific "cases" and "controversies," and "the integrity of judicial review" requires that the court's decision be applied "to all similar cases pending on direct review." *Id.* at 322-323. Second, nonretroactive application of new constitutional rulings "violates the principle of treating similarly situated defendants the same." *Id.* at 323. The unequal treatment arises from the Article III requirement that a new constitutional rule be applied to the litigants before the court in the case announcing the new rule. As the *Griffith* Court noted, "it hardly comports with the ideal of 'administration of justice with an even hand,' when one 'chance beneficiary – the lucky individual whose case was chosen as the occasion for announcing the new principle – enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine.'" *Id.* at 327, quoting *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977) (Powell, J., concurring in the judgment).

The Court continued its rethinking of retroactivity in *Teague v. Lane*, 489 U.S. 288 (1989). In that case, a habeas corpus petitioner sought a new constitutional rule extending to the petit jury the Sixth Amendment requirement that the jury venire be drawn from a fair cross-section of the community. The Court declined, however, to address the petitioner's contention, establishing the principle that the Court will not consider new constitutional rules of criminal procedure in habeas corpus proceedings except in certain very narrow circumstances.

The reasoning of the plurality opinion in *Teague* bears directly on the correct disposition of this case and, thus, warrants extended discussion.

The *Teague* plurality opened its analysis by adopting Justice Harlan's view that new constitutional rules of criminal procedure should not be applied retroactively to cases on collateral review unless the new rule (1) immunizes the defendant's conduct from criminal proscription or (2) requires compliance with a procedure that is "implicit in the concept of ordered liberty." *Id.* at 307. In contrast to direct appellate review of criminal convictions, the need for finality in the criminal justice process weighs heavily against applying new constitutional rules retroactively in collateral proceedings. Applying Justice Harlan's retroactivity standard to the habeas petitioner's claimed Sixth Amendment right, the *Teague* plurality concluded that the proposed new constitutional rule did not satisfy either exception to the general rule of nonretroactivity for cases on collateral review. And, because the proposed rule, if established by the Court, would not be applicable to other similarly situated habeas petitioners, the Court declined even to address the merits of the petitioner's constitutional claim. The plurality reasoned as follows:

> Were we to recognize the new rule urged by petitioner in this case, we would *have to* give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated. . . . [S]uch an inequitable result would be "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Stovall v. Denno*, 388 U.S. [293, 301 (1967)].

489 U.S. at 315 (emphasis added). To avoid both "the inequity resulting from the uneven application of new rules to similarly situated defendants," and the problems

of "rendering advisory opinions," the plurality adopted "the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review . . . . " *Id.* at 316 (emphasis in original).

The Court's decision in *Teague* thus yields two points of controlling significance to the instant case. First, the plurality recognized that federal courts have no discretion simply to withhold the benefit of a new constitutional ruling from the litigants before the court in the case announcing the new rule. Extending appropriate relief to the parties before the court in such a case is the "unavoidable consequence" of the "command of Article III of the Constitution that [federal courts] resolve issues solely in concrete cases or controversies . . . ." *Stovall*, 388 U.S. at 301. Indeed, this fundamental tenet of Article III is what gave rise to the dilemma faced by the court in *Teague*. Because any new Sixth Amendment rule recognized by the Court would *have to* be applied to the petitioner's case, but would not qualify for retroactive application to other similarly situated habeas petitioners, the Court was faced with a choice: either it could decide the petitioner's Sixth Amendment claim and tolerate any disparate treatment among similarly situated habeas petitioners that acceptance of the claim would yield, or it could abstain from considering the merits of the petitioner's claim.

The second point of critical significance to the instant case is that the course followed by the *Teague* plurality – to abstain from considering the merits of the habeas petitioner's constitutional claim – is simply not available in a case, like this one, pending on direct appellate review. The writ of habeas corpus is discretionary. *See, e.g., Stone v. Powell*, 428 U.S. 465, 478 n.11 (1976). The exercise of appellate jurisdiction, however, is not. Federal

courts are not free to abstain from considering substantial and properly presented constitutional claims on direct review. To do so would constitute an abdication of the judicial function.[14]

3. Because the Court's retroactivity rulings in the criminal law area rested on considerations inherent in "the nature of judicial review," and on the fundamental principle of the equal judicial treatment of similarly situated litigants, it was inevitable that the Court would extend those rulings to civil cases as well. "*Griffith* cannot be confined to the criminal law." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991) (opinion of Souter, J., joined by Stevens, J.).

At issue in *Beam* was whether an earlier decision invalidating a discriminatory state liquor tax should be applied retroactively to a virtually identical claim arising on facts antedating the earlier decision. In announcing the decision of the Court in *Beam*, Justice Souter identified two forms of prospective decisionmaking: "pure prospectivity," in which the court declines to apply a new rule of law even to the parties in the very case in which the new rule is announced, and "selective prospectivity,"

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[14] *See, e.g., England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964) ("'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . '") (quoting *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1908)); *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893) ("[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."); *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.")

in which the court applies a newly announced rule to the parties before it, but then returns to the old rule with respect to all other cases arising on facts predating the new rule. The *Beam* Court, relying on the reasoning of *Griffith*, outlawed selective prospectivity in civil cases, holding that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." 501 U.S. at 544.

More relevant to the instant case, however, were Justice Souter's comments concerning pure prospectivity. With respect to criminal cases, Justice Souter noted that purely prospective adjudication is wholly unknown and unavailable: "[R]etroactive application could hardly [be] denied the litigant in the law changing decision itself. A criminal defendant usually seeks one thing only on appeal, the reversal of his conviction; future application would provide little in the way of solace." *Id.* at 537. With respect to civil cases, Justice Souter questioned whether "pure prospectivity may be had at all," *id.* at 541, but refused to "speculate as to the bounds or propriety of pure prospectivity." *Id.* at 544.

While none of the opinions in *Beam* garnered the support of a majority of the Court, any doubt about the decision's precedential status was eliminated in *Harper v. Virginia Dept. of Taxation*, 113 S. Ct. 2510 (1993). Relying heavily both on *Griffith* and on Justice Souter's opinion in *Beam*, a majority of the Court held that

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate . . . announcement of the rule.

Id. at 2517. The Court made clear that its ruling, like that in *Griffith*, was dictated by "basic norms of constitutional adjudication." *Id.* at 2516, quoting *Griffith v. Kentucky*, 479 U.S. at 322. As the Court noted: "Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.' " *Id.* at 2517-18, quoting *American Trucking Ass'ns Inc. v. Smith*, 496 U.S. 167, 214 (1990) (Stevens, J., dissenting). Seizing upon this statement and similar ones in the majority opinion, the dissenters in *Harper* read the opinion as "intimat[ing] that pure prospectivity may be prohibited as well." 113 S. Ct. at 2527 (O'Connor, J., joined by Rehnquist, C.J., dissenting).

4. As the foregoing survey of this Court's recent retroactivity rulings reflects, a candid reading of the Court's decisions appears to foreclose purely prospective decisionmaking. If "the nature of judicial review" under Article III of the Constitution requires that all newly declared constitutional rules be applied to all cases, whether criminal (*Griffith*) or civil (*Harper*), still open on direct review, then it follows *a fortiori* that the new constitutional rule must be applied in the very case in which it is announced. Similarly, if the courts are not free "to disregard current law," then a court is bound to resolve each claim properly before it in accord with its best understanding of the rules of law governing the claim. Indeed, if the phrase "due process of law" means anything, surely it must mean that a litigant in a federal court is entitled to have his claim resolved in accordance with the law – the *right* law. Justice Harlan put the point well: "[O]nce the decision to abandon precedent is made, I see no justification for applying principles determined to be wrong, be they constitutional or otherwise, to litigants who are in or may still come to court." *United States v.*

Estate of Donnelly, 397 U.S. 286, 295-297 (1970) (concurring opinion).

But even if there is some circumstance in which a purely prospective decision would be consistent with "basic norms of constitutional adjudication," it is not this case. Here, a government law enforcement agency seeks the judicial imposition of a civil penalty for an alleged violation of a federal regulatory statute. As previously discussed, in the criminal law area, the Court has long recognized, without dissent, that application of a new constitutional rule to the parties in the case announcing it is an "unavoidable consequence" of Article III's prohibition against rendering advisory opinions. Indeed, even the dissenting Members of the Court in *Harper* acknowledged that purely prospective decisionmaking is inappropriate in a criminal case. In contrast to civil litigants, who may receive some benefit from purely prospective relief, "[t]he criminal defendant . . . is usually interested only in one remedy – reversal of his conviction. *That* remedy can be obtained only if the rule is applied retroactively." *Harper*, 113 S. Ct. at 2531 (O'Connor, J., joined by Rehnquist, C. J., dissenting) (emphasis in original); *see American Trucking*, 496 U.S. at 199 (1990) ("The prospective invalidation of a rule relied on in securing his conviction will not assist the criminal defendant in any way.").[15]

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[15] In arguing against the extension of *Griffith's* retroactivity principles to civil cases, the dissenters in *Harper* distinguished the civil and criminal contexts on two additional grounds. *See Harper*, 113 S. Ct. at 2530-31 (O'Connor, J., joined by Rehnquist, C. J., dissenting). First, they argued that "the generalized policy of favoring individual rights over governmental prerogative can justify the elimination of prospectivity in the criminal arena." *Id.* at 2530. Second, the dissenters argued that, while "there is little difference between the criminal defendant in whose case a decision is announced and the defendant who

Pure prospectivity for new constitutional rules in the criminal area would thus deaden "the incentive of counsel to advance contentions requiring a change in the law. . . . " *Stovall*, 388 U.S. at 301. These considerations apply with equal force to a defendant in a civil enforcement action seeking the imposition of civil penalties for an alleged violation of a federal regulatory statute.

5. The Solicitor General argues that "[u]nless and until the Court's prior decisions employing pure prospectivity are overruled, established law makes clear that this course of action is permissible in appropriate situations." U.S. Br. at 28. He cites four cases in which this Court allegedly rendered a purely prospective judgment by declining to apply the newly announced rule of law to the parties before it: *Buckley v. Valeo*, 424 U.S. 1 (1976); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); and *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). Of the cases cited, only one – *England* – is truly an example of pure prospectivity. Indeed, *England* is the only case that we have been able to find in which the

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seeks certiorari on the same question two days later," the litigants in follow-on civil cases may not be similarly situated to the litigants in the case in which the new rule of civil law was announced. *Id.* at 2531. In this regard, the dissent noted that the party in *Harper* seeking retroactive application of an earlier decision had not "litigated and preserved the retroactivity question." Neither of these points, however, serves to distinguish in any way a criminal prosecution from a civil enforcement action by governmental authorities. Indeed, the Solicitor General himself acknowledges that "the present case involves a challenge to the Commission's *prosecutorial* rather than adjudicative functions." U.S. Br. at 26 (emphasis added). We also note that unlike the litigant in *Harper*, respondents here raised their constitutional defenses to the Commission's enforcement action in their answer to the Commission's complaint. *See* J.A. 16-17.

rule adopted in a law-changing case was not applied to the parties before the Court. The government, however, relies most heavily on *Buckley* and *Northern Pipeline*, so we turn first to those cases.

In *Buckley*, this Court accorded "*de facto* validity" to the past acts of the Commission. But *Buckley* was not an enforcement action brought by a federal regulatory agency. Rather, it was an action brought against the Commission solely for declaratory and injunctive relief. The case therefore had, and could only have had, "purely prospective impact," Pet. App. 17a, in that the FEC had taken no action against the plaintiffs at the time the suit was filed. It cannot be argued that the plaintiffs in *Buckley*, although they prevailed, were granted no remedy; they got precisely the remedy they sought.

Nor did the Court's validation of the Commission's past acts deprive any other litigant of a constitutional defense to a pending enforcement action. The *Buckley* case was brought immediately upon passage of the FECA, and, as this Court acknowledged, no judicial enforcement action had been initiated by the Commission at the time of this Court's decision. *See Buckley*, 424 U.S. at 114-118 & n.157.[16] Indeed, the Commission had not even exercised its rulemaking power under the statute until after the Court of Appeals' decision had been rendered. *Id.* at 115-116. In short, nothing in this Court's decision in *Buckley* suggests that had the case arisen in the context of a defense to an enforcement action, this Court would have validated the FEC's actions, including

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[16] If there had been other parties involved in litigation or enforcement matters against the Commission when *Buckley* was decided to whom the Court's holding did not retroactively apply, *Buckley* would have been another example of "selective prospectivity," a practice that the Court has definitively rejected. *Harper*, 113 S. Ct. at 2517.

any award of civil penalties, notwithstanding the Court's determination that the Commission itself was constitutionally invalid and thus without authority to initiate the action.

Nor is *Northern Pipeline* an example of pure prospectivity. In that case, the Court held that the new rule it had announced – that a federal bankruptcy court lacks constitutional authority to adjudicate contract claims arising under state law – "shall apply only prospectively." 458 U.S. at 88. Nonetheless, it is clear, as the court of appeals below concluded, that "the party who challenged the constitutionality of the statute was afforded relief." Pet. App. 18a. Not only did the Court affirm the district court's judgment dismissing the case, it expressly stated that "at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide *this* state-law contract claim against Marathon." 458 U.S. at 87 n.40 (emphasis added).

The issue in *Chevron Oil* was whether the time for bringing the action was governed by a state statute of limitations, in which case the action was time-barred, or by the admiralty law doctrine of laches, in which case it was not. While the case was pending before the district court, the Supreme Court held in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), that state law rather than admiralty law applies in such cases. The issue before the Supreme Court in *Chevron Oil* was thus whether "*Rodrigue* should . . . be applied retroactively to bar actions filed before the date of its announcement." 404 U.S. at 99. The Court held that state statutes of limitations made applicable under *Rodrigue* "should not be applied retroactively." 404 U.S. at 108 n.10.

Chevron Oil is thus distinguishable from this case on several grounds. First, and most importantly, it was not the law-changing case; *Rodrigue* was. And the rule of law

announced in *Rodrigue* was applied to the litigants before the court in that case. *See Rodrigue*, 395 U.S. at 366. Thus, *Chevron Oil* was not an example of purely prospective decisionmaking. Rather, it was a straight-forward example of selective prospectivity, which this Court expressly overruled in *Harper*. Second, the rule applied in *Chevron Oil* was not a constitutional norm. The case involved, instead, "the application of a statute of limitations, an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver." *American Trucking*, 496 U.S. at 221 (Stevens, J., dissenting). Finally, the case did not involve the applicability of a constitutional defense to a government enforcement action.

The *England* case is an example of pure prospectivity, but it too is readily distinguishable from this case. The plaintiffs in *England* challenged the constitutionality of certain state law requirements governing the practice of medicine. The federal district court, however, abstained from deciding the federal constitutional issue until certain potentially dispositive state law issues could be resolved in state court. The plaintiff litigated in state court not only the state law question, but his federal constitutional claim as well, under the reasonable belief that earlier Supreme Court precedent required him to do so. The *England* Court held that a federal litigant is entitled to return to the abstaining federal district court for resolution of his federal claims "unless it clearly appears that he voluntarily . . . and fully litigated his federal claims in the state courts." 375 U.S. at 421. Although the Court concluded that "[o]n the record in the instant case, the rule we announce today would" foreclose reconsideration of plaintiff's federal claims in federal court, the Court was "unwilling to apply the rule against these appellants" since they had litigated their federal claims in

the state court upon the reasonable, though mistaken, view that they were required to do so. *Id.* at 422.

Thus, the rule that the Court announced in *England* but declined to apply to the parties before it did not enforce a constitutional norm, but rather concerned an issue – abstention – over which the Court had equitable discretion. Nor did the case arise in a context involving federal agency enforcement of criminal or civil penalties for an alleged violation of federal law.[17]

6. The parties in this case would not be debating, we submit, the applicability to respondents of a favorable constitutional ruling if respondents were seeking relief

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[17] The dissent in *Harper* cites two additional cases – *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), and *Cipriano v. City of Houma*, 395 U.S. 701 (1969) – in which this Court is said to have "announced rules of purely prospective effect." *Harper*, 113 S. Ct. at 2528 (O'Connor, J., joined by Rehnquist, C. J., dissenting); *see also Beam*, 501 U.S. at 545 (White, J., concurring in the judgment) (citing *Cipriano* as case in which a new rule was not applied retroactively, "even to the parties before the Court"). In both cases, the Court invalidated, on malapportionment grounds, state laws restricting the electorate for elections authorizing the issuance of municipal bonds. In both cases, the Court crafted a rule of partial retroactivity, applying its rulings only to prior elections that had been timely challenged under state law or had otherwise not become final as of the date of the decision. *See Cipriano*, 395 U.S. at 706 (ruling applies "only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final"); *Phoenix*, 399 U.S. at 214 ("[O]ur decision in this case will apply only to authorizations for general obligation bonds that are not final as of . . . the date of this decision."). In both cases, the bond authorization election giving rise to the Court's ruling was invalidated pursuant to the Court's ruling. In other words, in both cases the ruling was applied to the parties before the Court. Accordingly, neither case is an example of purely prospective adjudication.

for a violation of the First Amendment. Presumably even the government would not maintain that a decision by this Court that the Commission's enforcement action against respondents violated the First Amendment should be applied purely prospectively so as to allow the government to assess and collect a $40,000 fine for the exercise of constitutionally protected activity. The constitutional separation of powers, however, was designed by the Founders to provide "the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). And there is no basis in logic or law for creating a special "prospectivity" rule for decisions upholding the Constitution's structural limitations.

Indeed, this Court's separation of powers decisions refute the government's remarkable suggestion that the Court may, in successive breaths, declare both that the Constitution prohibits a federal official or body from exercising certain governmental authority, and that the government's exercise of such authority will nonetheless be deemed valid in this case. In *every one* of this Court's decisions upholding a separation of powers challenge to the constitutional validity of a federal officer's or body's authority, the Court has granted full relief to the plaintiff. For example, in *INS v. Chadha*, 462 U.S. 919 (1983), a deportation order against the plaintiff was canceled as a result of his successful challenge under Article I to a provision of the federal immigration law authorizing either House of Congress to invalidate the Attorney General's order suspending deportation. Even though one-house veto provisions had been incorporated into scores of statutes and their constitutional invalidity had not been foreshadowed in prior cases, there is no hint in *Chadha* that the one-house veto provision struck down there could simply be deemed valid, or applied purely prospectively, and Mr. Chadha sent on his way. *See also*

MWAA, 501 U.S. 252 (statutorily created Board of Review violated separation of powers and challenged act of Board, accordingly, invalid).

7. The availability of a remedy redressing a litigant's alleged injury is the premise of the well-established rule that "[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights." *Buckley*, 424 U.S. at 117. If, as the government contends, respondents in this case are not entitled to any meaningful relief even if their constitutional claim has merit, it follows that they are not entitled to assert their constitutional defense and that this Court is not entitled to reach and adjudicate its merits. This Court's cases resolving the merits of separation of powers challenges to government actions implicitly refute the government's claim that this Court is free both to adjudicate the merits of respondents' constitutional claim and to deny respondents the benefit of a favorable ruling.

In sum, the court of appeals below correctly concluded that in this enforcement action there is "no theory that would permit [a court] to declare the Commission's structure unconstitutional without providing relief to the [respondents] in this case." Pet. App. 18a.

B. The De Facto Officer Doctrine Is Not Applicable to This Case.

The Commission and the Solicitor General also invoke the *de facto* officer doctrine in support of their contention that the Court should withhold from respondents any benefit of a favorable constitutional ruling. *See* FEC Br. at 26-32; U.S. Br. at 23-29. Under that doctrine,

"where there is an office to be filled and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer *de facto*, and binding upon the public." *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (plurality opinion of Harlan, J.) (quoting *McDowell v. United States*, 159 U.S. 596, 602 (1895)). Because respondents challenge the FEC's constitutional authority to bring this enforcement action, the *de facto* officer doctrine has no application to this case.

1. It is well settled that in order for a putative governmental official to be considered a *de facto* officer, he must, at a minimum, occupy a *de jure* office – that is, a valid office created pursuant to a constitutional act.[18] This proposition was central to this Court's holding in the leading case of *Norton v. Shelby County*, 118 U.S. 425 (1886). There, in the course of declining to apply the *de facto* officer doctrine, the Court stated that "the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an 'officer' who holds no office, and a public office can exist only by force of law." *Id.* at 442. And in response to the plaintiff's argument that "a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbents," *id.*, the

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[18] *See* Albert Constantineau, *A Treatise on the De Facto Doctrine* § 28 at 41 (1910) ("[T]he existence of a de jure office is a condition precedent to the existence of an officer de facto, and that without such an office the pretended officer can never be afforded any legal recognition."); *id.* § 34 at 51 ("A further corollary of the general rule is, that an unconstitutional Act, being no law, is incapable of creating a de jure office, and therefore the incumbent of an office thus created is not an officer de facto."); Note, *The De Facto Officer Doctrine: The Case for Continued Application*, 85 Colum. L. Rev. 1121, 1122-23 (1985).

Court stated: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; *it creates no office*; it is, in legal contemplation, as inoperative as though it had never been passed." *Id.* (emphasis added); *see also United States v. Royer*, 268 U.S. 394, 397 (1925) ("Of course, there can be no incumbent de facto of an office if there be no office to fill.") (citing *Norton*); *McDowell*, 159 U.S. at 601 (same).[19] The doctrine thus distinguishes between actions taken by individuals occupying an invalid "office" that was created by an unconstitutional act, and those taken by an individual who was unlawfully elected or appointed to a valid, or *de jure*, office; the official actions of the latter, but never of the former, may be accorded *de facto* validity.[20]

It follows, therefore, that if the Court concludes that the FEC is unconstitutional – in other words, if it agrees with respondents and the court of appeals that the *ex officio* members of the Commission constitutionally disqualify it from performing a purely executive function –

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[19] *See also* Clifford L. Pannam, *Unconstitutional Statutes and De Facto Officers*, 2 Fed. L. Rev. 37, 51 (1966) ("*Norton v. Shelby County* thus states a very serious limitation on the operation of the *de facto* doctrine. It operates to deny the status of a *de facto* officer to any person who purports to fill an office which has been created by an unconstitutional statute.").

[20] *See Norton*, 118 U.S. at 444 (noting that certain cases cited by counsel in support of applying the doctrine "apply only to the invalidity, irregularity, or unconstitutionality of the mode by which the party was appointed or elected to a legally existing office. None of them sanctions the doctrine that there can be a *de facto* office under a constitutional government . . . . "); *see also Ryan v. Tinsley*, 316 F.2d 430, 432 (10th Cir.), *appeal dismissed* and *cert. denied*, 375 U.S. 17 (1963) (recognizing distinction and citing *Norton*); Pannam, 2 Fed. L. Rev. at 48-50 (same).

then the FEC's prior actions in connection with this enforcement action cannot be validated under the *de facto* officer doctrine. Wholly ignoring this prerequisite to the application of that doctrine, the FEC and the United States argue, in effect, that the equities of this case warrant its application. But while it is true that the doctrine "is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby," *Norton*, 118 U.S. at 441, *Norton* itself makes clear that these equitable considerations must give way when the application of the doctrine would permit the government to evade constitutional constraints.[21] The answer to the FEC's complaint that it will work a great hardship to require the Commission to revisit its prior (unauthorized) actions is,

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[21] While respondents do not agree that the equities here weigh in favor of applying the doctrine, the Court need not address that question. In *Norton*, for example, the Court's refusal to apply the *de facto* officer doctrine permitted Shelby County to avoid any obligation in connection with bonds that, while not authorized by a constitutional body, nonetheless benefitted the County's treasury. Weighing this seemingly harsh result against the rule of law adopted by the Court in that case, Judge Constantineau concluded as follows:

> [I]f a legislative body, whose powers are limited by a written instrument, be permitted to create offices in violation of such instrument, and the courts are to condone such wrongdoing by holding the incumbents thereof officers de facto, it is easily seen that the paramount rights of the people are unduly sacrificed to avoid occasional evils to a few individuals or to a small portion of the community. To sanction such usurpation of power, is to allow the legislature to ignore and override the sovereign will and authority of their masters.

Constantineau, § 40 at 60-61. This reasoning applies with equal force in this case.

then, that the constitutional separation of powers is a weightier consideration than administrative convenience.

2. Quite apart from the absence of a *de jure* office, the *de facto* officer doctrine is inapplicable for another reason: respondents' substantive challenge to the FEC's authority to prosecute this enforcement action is "based upon nonfrivolous constitutional grounds." *Glidden*, 370 U.S. at 536. As the Solicitor General acknowledges, the *de facto* officer doctrine is a doctrine of preclusion, preventing a party from raising, and a court from adjudicating, a collateral attack on a putative officer's actions based on the alleged unlawfulness of the putative officer's election or appointment. U.S. Br. at 25 (citing *Ball v. United States*, 140 U.S. 118, 129 (1891); *McDowell*, 159 U.S. at 601-02; *Ryan*, 316 F.2d at 432). It operates, however, only where the substantive ground for the challenge is some technical legal defect in the incumbent's "title" to the office.[22]

Glidden illustrates this point clearly. There, the Solicitor General argued that the petitioners, having failed to raise below their Article III objection to the judges who decided their cases, ought to be precluded by the *de facto* officer doctrine from raising that claim for the first time on appeal. Justice Harlan noted first that the doctrine did not apply "when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business," 370 U.S. at 535-36, and held that "[*a*] *fortiori* is this

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[22] *Compare Norton*, 118 U.S. at 441-449 (doctrine not applied where "office" was unconstitutionally created) *with Ball*, 140 U.S. at 119 (doctrine applied where designation of sitting judge to fill vacancy in another district may have been in violation of statute), and *McDowell*, 159 U.S. at 601-02 (same).

so when the challenge is based upon nonfrivolous constitutional grounds." *Id.* at 536.[23]

The rule stated expressly in *Glidden* – that the *de facto* officer doctrine will not operate to pre[redacted] a court from addressing the merits of a substantial constitutional claim – is implicit in all of the separation of powers cases decided on the merits by this Court. We have noted earlier that in *Chadha*, *MWAA*, and other separation of powers cases similar to this one, the Court decided the merits of the constitutional issue and applied to the parties before the Court the newly announced rule of law; the Court obviously did not invoke the *de facto* officer doctrine to preclude consideration of the constitutional challenges. *See also, e.g., Mistretta v. United States*, 488 U.S. 361 (1989) (reaching merits but rejecting challenge); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (same).

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[23] This same principle was applied by the court of appeals below in rejecting the doctrine: "[T]he court should avoid an interpretation of the de facto officer doctrine that would likely make it impossible for these plaintiffs to bring their assumedly substantial constitutional claim and would render legal norms concerning appointment and eligibility to hold office unenforceable." Pet. App. 17a, n.6 (quoting *Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984)). The commentators agree. *See* Constantineau, § 40 at 60-61; Pannam, 2 Fed. L. Rev. at 61-62 ("[T]here may be constitutional policies and provisions which are deemed to be so important that their thrust should not be curbed by the application of the *de facto* doctrine. In other words there may be situations in which public inconvenience and the frustration of legitimate reliance must give way to the retroactive invalidation of official acts in order to vindicate a constitutional boundary, or to guarantee a constitutional right."); Note, 85 Colum. L. Rev. at 1126 ("The Supreme Court itself has held that the doctrine does not apply where there is a 'nonfrivolous constitutional' challenge to an exercise of authority.") (quoting *Glidden*).

Respondents' separation of powers claim, like the Article III challenge in *Glidden*, "relates to basic constitutional protections designed in part for the benefit of litigants." *Glidden*, 370 U.S. at 536. The *de facto* officer doctrine does not apply to this case.

C. A Newly Constituted FEC May Not Ratify the Unauthorized Acts of Its Unconstitutional Predecessor.

The FEC's contends that this Court should remand this case to the court of appeals to permit the "reconstituted Commission . . . to decide whether to proceed with this civil law enforcement action against them." FEC. Br. at 30; *see also id.* at 13, 26, 30-32 and n.20.[24] If, as the FEC contends, the reconstituted Commission can simply vote to ratify its past actions and "to continue pursuing this case," *id.* at 32, then the Commission's unconstitutionality is, legally and practically, immaterial. The principle of ratification does not support that result.

Ratification, which is a principle of the law of agency, permits a principal to validate an agent's prior action even though the agent was not unauthorized to perform the act at the time.[25] It is clear that a constitutionally

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[24] The FEC asserts that such a remand would accord respondents "full relief on their constitutional claim." FEC Br. at 30. The FEC is free at any time to discontinue this enforcement action, if that is its will. Requiring it to formally "decide whether to proceed" with an enforcement action on which it is proceeding aggressively is, obviously, a meaningless gesture. Far from "full relief," the remand suggested by the Commission is no relief whatsoever.

[25] *See* Restatement (Second) of Agency § 82 (1957) ("Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given

valid FEC – that is, an FEC reconstituted to exclude the *ex officio* members – cannot ratify prior constitutionally unauthorized actions taken by the former, invalid FEC. First, there simply can be no principal-agent relationship between a reconstituted FEC and the Commission that has thus far prosecuted this enforcement action; yet such a relationship is a *sine qua non* of the principle of ratification.[26]

Second, "[a]n act which, when done, the purported or intended principal could not have authorized, he cannot ratify." Restatement (Second) of Agency § 84(2) (1957); *see also id.* cmt. c ("[A]n act is not capable of ratification unless the person acting purports or intends to act for a person who, at the time of the act, has capacity to authorize such an act. Thus, the affirmance by a person not in existence at the time of the original act

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effect as if originally authorized by him."). This Court has repeatedly endorsed the doctrine of ratification, usually in cases involving congressional ratifications of government actions that were taken by governmental entities without the requisite statutory authorization. *See, e.g., Swayne & Hoyt v. United States*, 300 U.S. 297, 301-02 (1937) ("It is well settled that Congress may, by enactment not otherwise inappropriate, ratify . . . acts which it might have authorized, and give the force of law to official action unauthorized when taken.") (internal quotations and citations omitted); *United States v. Heinszen*, 206 U.S. 370, 384 (1907) (same).

[26] *See, e.g., Franklin Sav. Ass'n v. Office of Thrift Supervision*, 740 F. Supp. 1535, 1539 (D.Kan. 1990), *rev'd on other grounds*, 934 F.2d 1127 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992) (holding, in case where constitutionally valid officer attempted to ratify actions of constitutionally invalid predecessor, that "Director Ryan is not and never was Director Wall's principal, and thus, cannot ratify Director Wall's act"); *see also Heinszen*, 206 U.S. at 382.

does not result in ratification.").[27] Because the "new" FEC plainly did not exist at the time this enforcement action was commenced, an attempt to ratify that unauthorized action cannot be effective.

Finally, any attempted ratification must fail because the "old" FEC was an unconstitutional entity, and as such it could not have been authorized to prosecute this enforcement action. *See, e.g., Norton,* 118 U.S. at 451 (rejecting claim that bonds issued by unconstitutional body could be ratified by lawful entity; "[i]t could not ratify the acts of an unauthorized body."). This unauthorized enforcement action cannot be salvaged through ratification.

* * *

The short of the matter is that the Court is not free "to declare the Commission's structure unconstitutional without providing relief to [respondents] in this case." Pet. App. 18a. There is simply no merit in the government's desperate arguments that, notwithstanding the FEC's unconstitutionality, its prosecution of this enforcement action must nonetheless be allowed to continue based upon the *de facto* officer doctrine, or "pure prospectivity," or ratification, or some combination of these three theories. If this Court agrees that the Commission's structure is unconstitutional for purposes of prosecuting an enforcement action, it should affirm the court of appeals' judgment requiring dismissal of this action.

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[27] *See also Cook v. Tullis,* 85 U.S. (18 Wall.) 332, 338 (1874) ("[I]t is essential that the party ratifying should be able not merely to do the act ratified *at the time the act was done,* but also at the time the ratification was made.") (emphasis added); *Franklin,* 740 F. Supp. at 1539.

IV. The Absence of Presidential Removal Power Over Commissioners and the Requirement of Bipartisan Membership Render the Commission Unconstitutional

The constitutional violation found by the court of appeals does not exhaust the separation of powers defects in the structure of the FEC. As we demonstrate below, even if the Court holds that the statutory membership of congressional agents on the FEC does not violate the separation of powers, the court of appeals' decision should nonetheless be affirmed.[28]

1. We submit that the Executive has no removal authority over Commissioners, and that the FECA thus unconstitutionally impairs the President's ability to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3, cl. 4. The court of appeals concluded that "there is not much vitality to the [removal] claim after *Morrison v. Olson,* 487 U.S. 654 (1988)." Pet. App. 11a. The

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[28] The FEC argues that the Court should not address these two issues on the ground that respondents did not raise them in a cross-petition for certiorari, and because "none of the[m] . . . is a 'necessary predicate to the resolution of the question[s] presented in the petition' for certiorari." FEC at 32 (quoting *Caspari v. Bohlen,* 114 S. Ct. 948, 953 (1994)). The FEC is wrong. Supreme Court Rule 14.1(a) – the rule at issue in *Caspari* – governs what issues the *petitioner* may raise in support of reversal. It is well settled, however, that a *respondent* may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Confederated Bands and Tribes of Yakima Indian Nation,* 439 U.S. 463, 476 n.20 (1979); *see also Johnson v. De Grandy,* 114 S. Ct. 2647, 2653 n.5 (1994) ("The [respondent] is entitled to 'urge any grounds which would lend support to the judgment below.' ") (quoting *Dayton Bd. of Ed. v. Brinkman,* 433 U.S. 406, 419 (1977)).

court also questioned the premise of our argument, stating that it could "safely assume that the President would at a minimum have authority to discharge a Commissioner for good cause – if for no other." Pet. App. 12a.

To begin with the latter point, the Act itself is silent on the question of removal. *See* Pet. App. 12a. While it is true that "at will" presidential removal power may inhere in a power to appoint officers, *see, e.g., Shurtleff v. United States*, 189 U.S. 311, 316 (1903), such an interpretation here would obviously conflict with the Act's structure and legislative history confirming the intent of Congress to ensure the FEC's independence from presidential control.[29]

Nor is the removal issue resolved by assuming that the Act grants the President "good cause" removal power over Commissioners. First, such an assumption would require the Court somehow to coax from the statute's *silence* on the issue not only a power to remove, but also particular limitations on that power – in essence, a removal "code." Such an interpretive project is particularly complicated here; Congress has experimented with a variety of restrictions on Presidential removal power, and it is difficult to conceive of the basis on which the

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[29] While the Senate Report described the 1976 Amendment to the FECA as "a measure designed to reconstitute the [FEC] as an independent executive branch agency," Sen. Rep. No. 94-677, 94th Cong., 2d Sess. 1 (1976), the history of the Amendments, particularly the inclusion of a sweeping one-House legislative veto, amply reflect Congress' intention to render the FEC wholly independent (save for appointment) of Executive control and beholden solely to Congress. *See, e.g.*, H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 881 (1976) (minority views) ("[The amendments] strike at the very heart of an independent [FEC] and in effect reconstitute it as a virtual sub-committee of this Committee."); 122 Cong. Rec. S3686, S6364, H2535, H8864 (1976) (statements of Sens. Clark and Cannon, Reps. McHugh and Hays).

Court could choose among them.[30] The Act's legislative history is unhelpful in this regard, for it contains not a single reference to the issue of removal, thus further reinforcing the conclusion that no Presidential removal authority was contemplated.

More importantly, a limited presidential removal power over FEC Commissioners would not satisfy constitutional standards. Prior decisions of this Court upholding "good cause" limitations on the President's removal power over government appointees do not counsel otherwise. For example, the officers at issue in both *Humphrey's*

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[30] For example, among federal independent agencies that have civil enforcement authority, there are at least four others in addition to the FEC that have no statutory provision relating to removal. *See, e.g.*, Commodity Futures Trading Commission, 7 U.S.C. § 4(a); Equal Employment Opportunity Commission, 42 U.S.C. § 2000(e); Securities and Exchange Commission, 15 U.S.C. § 78(d). By contrast, the members of at least six agencies with law enforcement authority are removable by the President for "inefficiency, neglect of duty, or malfeasance in office." *See, e.g.*, Federal Trade Commission, 15 U.S.C. § 41; Interstate Commerce Commission, 49 U.S.C. § 10301(c); Nuclear Regulatory Commission, 42 U.S.C. § 5841(e); *see also*, National Labor Relations Board, 29 U.S.C. § 153(a) ("for neglect of duty or malfeasance in office"). Members of three additional agencies with substantial executive authority are removable by the President "for cause." *See* Federal Reserve System, 12 U.S.C. § 242; Postal Rate Commission, 39 U.S.C. § 3601(a); U.S. Postal Service, 39 U.S.C. § 202(a). And while some statutes purporting to create an "independent agency in the executive branch" include no removal provision, *see, e.g.*, Federal Housing Finance Board, 12 U.S.C. § 1422(a); Farm Credit Administration, 12 U.S.C. § 2242; Federal Labor Relations Authority, 5 U.S.C. § 903, other such agencies include explicit removal provisions. *See* National Archives and Records Administration, 44 U.S.C. § 2103 ("at will" removal); National Mediation Board, 45 U.S.C. § 154 ("inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause").

Executor v. United States, 295 U.S. 602 (1935),[31] and *Weiner v. United States*, 357 U.S. 349 (1958), lacked the authority, which FEC Commissioners manifestly enjoy, to enforce a statute by seeking judicial imposition of a civil penalty – the power that gives rise to this instant case, and one that this Court has consistently recognized to be at the core of Executive Branch functions. *See Buckley*, 424 U.S. at 138. By contrast, this Court characterized the powers possessed by the FTC Commissioners in *Humphrey's Executor* and the members of the War Claims Commission in *Wiener* as "quasi-legislative" or "quasi-judicial."[32]

Similarly, the FECA is wholly lacking in the type of statutory protections of executive branch prerogatives that this Court in *Morrison* found essential to the validity of the "good cause" limitation on removal of an "independent counsel" appointed under the Ethics in Government Act of 1978. *Morrison v. Olson*, 487 U.S. 654 (1988). As the Court emphasized:

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[31] *Humphrey's Executor* is further distinguishable, of course, in that the FTC statute at issue in that case expressly provided for presidential removal for "inefficiency, neglect of duty, or malfeasance in office." 195 U.S. at 619. There was thus no statutory silence to interpret.

[32] In *Humphrey's Executor*, the Court stated that the FTC "cannot in any proper sense be characterized as an arm or an eye of the executive," 295 U.S. at 628, and held that "[t]o the extent it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi-legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government." *Id.* The FTC did not possess civil enforcement authority. The powers of the War Claims Commission were even farther removed from the executive realm, as that body was established solely to "adjudicate according to law" three narrow classes of claims against Japan. *Wiener*, 57 U.S. at 354.

> No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment . . . is committed to his unreviewable discretion. The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not "possible" to do so . . . . [I]n our view *these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.*

Id. at 696 (emphasis added). It is clear that the Executive exercises no similar control over FEC Commissioners. The *Morrison* Court also noted that the office of independent counsel was a "temporary" office, "appointed essentially to accomplish a single task." 487 U.S. at 672. In addition, the independent counsel had no "authority to formulate policy for the Government or the Executive Branch." *Id.* at 671. Again, the powers of the FEC stand in stark contrast, for it is empowered to "administer, seek to obtain compliance with, and formulate policy with respect to" the federal election campaign laws, and it has "exclusive jurisdiction with respect to the civil enforcement of such [laws]." 2 U.S.C. § 437c(b)(1). And while the independent counsel is an inferior officer "subject to removal by a higher Executive Branch official" (*i.e.*, the Attorney General), there is no such official to whom the

Commissioners are " 'inferior' in rank and authority." *Morrison*, 487 U.S. at 671.[33]

In sum, because the President has no power to remove FEC Commissioners, let alone the "at will" removal power that, we submit, the Constitution requires for principal officers performing law enforcement functions, the FECA unconstitutionally impairs the President's ability to "take Care that the Laws be faithfully executed."

2. The FECA also impermissibly limits the Executive's power under the Appointments Clause to nominate principal officers who perform executive functions. The Constitution explicitly assigns to the President illimitable power to nominate principal officers of the United States. The Act, however, provides in part that "[n]o more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party." 2 U.S.C. § 437c(a)(1).

The court of appeals held that this Appointments Clause claim was nonjusticiable, reasoning that "while such restrictions may raise serious constitutional questions, . . . it is impossible to determine in this case whether the *statute* actually limited the President's appointment power." Pet. App. 8a (emphasis in original).

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[33] The FEC argues that Article II does not require that the President be given such mechanisms for executive control where the relevant officers are appointed by the President. FEC Br. at 34 n.22. But the President's obligation to "take care that the laws be faithfully executed," *see* Art. II, § 3, cl. 4, is a continuing one; the President must, then, be able to monitor and direct his appointees. And in a more practical sense, we note that FEC Commissioners serve six-year terms; it follows that a President without at-will removal power would thus be forced to attempt to execute the laws through an officer not of his own choosing.

The court of appeals thus concluded that it could not determine whether the statute itself, or simply the President's perception of how the Senate intended to exercise its advice and consent prerogative, accounted for the Commission's perfectly bipartisan make-up.

While the Senate's advice and consent role surely provides that body determinative influence over the ultimate composition of the FEC, the Constitution grants "[n]o role whatsoever . . . either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment." *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring in the judgment).[34] And it is no answer to the Act's clear infringement of this principle to say that the President may have desired a bipartisan Commission even absent the statutory requirement to that effect. Presidents have uniformly heeded statutory bipartisan appointment requirements. And we are aware of no multimember board or Commission to which a President has made appointments on a strictly bipartisan basis in the absence of a statutory provision mandating such appointments. To profess uncertainty as to whether the law has exerted an impact on the Commission's membership is thus to close one's eyes to reality.

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[34] The exclusion of congressional influence from the nomination decision was unmistakably part of the Framers' design. *See e.g.*, The Federalist No. 66, at 449 (A. Hamilton) (J. Cooke ed. 1961) ("It will be the office of the President to *nominate*, and with the advice and consent of the Senate to *appoint*. There will be no exertion of choice on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*: they can only ratify or reject the choice he may have made.") (emphasis in original).

Moreover, the statutory requirement constitutes a *congressional* (*i.e.*, bicameral) limitation on the President's appointment power, while only the Senate is granted advice and consent authority. Equating the statutory mandate with the possible impact of the Senate's role is thus unwarranted. Because this statutory bipartisanship requirement constitutes a congressional restriction on the President's appointment power, it violates the Appointments Clause. Accordingly, the FEC is unconstitutional, and unauthorized to initiate and prosecute this action.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 93-1551

In the Supreme Court of the United States

OCTOBER TERM, 1994

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

NRA POLITICAL VICTORY FUND, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER FEDERAL ELECTION COMMISSION

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MISCELLANEOUS

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REPLY BRIEF FOR PETITIONER FEDERAL ELECTION COMMISSION

I. SEPARATION OF POWERS IS NOT VIOLATED BY THE INCLUSION OF NONVOTING *EX OFFICIO* MEMBERS ON THE FEDERAL ELECTION COMMISSION

Neither the Solicitor General nor the Respondents dispute the Commission's showing (FEC Br. 18-20) that the Act denies the Secretary of the Senate and the Clerk of the House any ability to control the exercise of the Commission's executive powers by the six voting Commissioners appointed by the President. Instead, the Solicitor General advocates adoption of a rigid "bright-line rule" (Br. 18, 20) excluding agents of Congress from ever participating even in a purely advisory role in any administrative agency's proceedings. Respondents' primary argument (Br. 14-15) is that a ruling finding this particular statutory scheme to be constitutional would automatically authorize Congress to place its agents at

the President's Cabinet table and in this Court's decisional conferences. We show below that both of these arguments rest upon a rigid view of the separation-of-powers principle inconsistent with this Court's precedents.

1. While acknowledging that there is "nothing illegitimate about efforts by members of one Branch to influence the decisions of the others," the Solicitor General argues that "Congress may not attempt to assert its views from *within* the Executive Branch by creating for its agents positions as members of an agency exercising executive powers" (Br. 19-20, emphasis in original). The Solicitor General relies upon a "bright-line rule" that "Congress may not place its agents as members of a governmental body, even in a non-voting capacity, if that body exercises powers that Congress may not exercise itself" (Br. 18).[1]

As shown in our opening brief (pp. 24-25), this Court has eschewed such "formalistic and unbending rules" in its separation-of-powers jurisprudence. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986). *See id.* at 857 ("bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries"). At least in cases like this one, involving the general principle of separation of powers rather than a specific provision in the text of the Constitution, *see Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 484-86 (1989) (Kennedy, J., concurring); *United States v. Frank*, 864 F.2d 992, 1013 (3d Cir. 1988), *cert. denied*, 490 U.S. 1095 (1989), the Court's "inquiry is focused on the 'unique aspects of the congressional plan at issue and its practical consequences,'" *Mistretta v. United States*, 488 U.S. 361, 393 (1989) (quoting *Schor*, 478 U.S. at 857).

[1] The Bill of Attainder Clause, U.S. Const. Art. I, § 9, cl. 3, has no application here because the Commission has no authority to impose remedies for civil violations of the Act. To enforce the Act, the Commission must institute a *de novo* civil action in federal district court, 2 U.S.C. §§ 437d(a)(6), 437g(a)(6)(A), and the Justice Department, not the Commission, is responsible for criminal enforcement of the Act. *See* 2 U.S.C. § 437g(a)(5)(C).

The Solicitor General argues (Br. 11-14, 18-19) that the Court should construe the label "member" as giving the Secretary and the Clerk "all the prerogatives of membership not specifically proscribed" (Br. 11), but he has failed to identify any such "prerogatives" beyond the ability, discussed in our opening brief (pp. 18-20), to offer advice on those matters the voting Commissioners discuss at a meeting. Because the statute explicitly denies them the one "prerogative" of membership—a vote—that would allow them to "participate" (Amicus Br. 11-12) in the *exercise* of the Commission's powers, rather than just in discussions, mere designation as "members" does not carry with it even "the *potential* for congressional usurpation of Executive Branch functions" (Amicus Br. 17, emphasis in original). *Cf. Michel v. Anderson*, 14 F.3d 623, 628-32 (D.C. Cir. 1994) (territorial delegates who may debate, but not vote, on the floor of the House are not "members" of the House of Representatives in violation of Art. I, § 2, even though they can vote in committee).[2]

The statute imposes no penalty of any kind that could deter the voting Commissioners from disregarding any advice from the *ex officio* members with which they disagree; it does not require them to explain why they have rejected such advice, to delay their decision until the *ex officio* members can be present to make their comments, or even to discuss a matter during a meeting before voting. *Cf. Hechinger v. Metropolitan Washington Airports Authority*, 1994 WL 520018, *7, *9-10 (D.C.

[2] In *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), a panel of members of Congress was given actual veto power over the Authority's decisions; the Court found the existence of such explicit statutory power to be impermissible even if in practice it "might prove to be innocuous." *Id.* at 277. In this case, by contrast, the statute precludes the Secretary and Clerk from exercising any authority over the Commission's decisions.

Cir., Sept. 27, 1994).[3] Thus, whatever may have been the expectations of some legislators in 1976 when Congress re-established the Commission (*but see* FEC Br. 20 n.11), the Act itself plainly gives the *ex officio* members no leverage to enforce compliance with their views.[4]

There is no dispute here that separation-of-powers principles do not preclude Congress from effectively influencing executive branch decisionmaking through oversight committees, budget restrictions, and even direct discussions with agency decisionmakers.[5] The argument

[3] The lower courts have upheld the requirements in the Competition in Contracting Act that executive decisionmakers delay effectuating contested decisions to provide the Comptroller General an opportunity to give his views and formally report to the Comptroller General if they reject the Comptroller General's advice. *See Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988), *rev'd en banc on other grounds*, 893 F.2d 205 (9th Cir. 1989); *Ameron, Inc. v. United States Army Corps of Engineers*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988).

[4] It is well-settled, contrary to the Solicitor General's suggestion (Br. 17), that a statute can be implemented narrowly to avoid separation-of-powers concerns. *Public Citizen*, 491 U.S. at 465-66 ("Our reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government"); *Morrison v. Olson*, 487 U.S. 654, 682 (1988) ("it is the duty of federal courts to construe a statute in order to save it from constitutional infirmities . . . and to that end we think a narrow construction is appropriate here"). The restrictions in the Commission's long-standing procedures on the role of the *ex officio* members (FEC Br. 6-7, 19-20) represent an expert construction of the Act that is entitled to deference, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981), even when separation of powers is at issue. *Schor*, 478 U.S. at 844-46.

[5] This has been acknowledged, for example, in decisions upholding "report-and-wait" requirements. *See, e.g., Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 690 (1987); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15 (1941); *City of Alexandria v. United States*, 737 F.2d 1022, 1026 (Fed. Cir. 1984). *See also* Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d-1 (agency cannot terminate funding

(Amicus Br. 18-20) that the Constitution is violated because designation as "members" permits the Secretary and Clerk to convey their views to the voting Commissioners from "within" the agency fails to give " 'practical attention to substance rather than doctrinaire reliance on formal categories,' " *Schor*, 478 U.S. at 848 (citation omitted). There would be no practical difference in their role if, instead of designating them as *ex officio* "members," Congress had, for example, provided only that "the Secretary and the Clerk may provide the Commission with their expert advice and counsel on any matters discussed at a meeting of the Commission." Just as the integrity of the votes cast by members of the House of Representatives is not compromised by the mere participation in debate by nonvoting territorial delegates, *see, e.g.*, 2 U.S.C. § 25a (District of Columbia); 48 U.S.C. §§ 1711 (Guam and Virgin Islands), 1731 (American Samoa), the decisions of the six voting Commissioners are not tainted merely because they might hear the views of the *ex officio* members. *See Michel v. Anderson*, 14 F.3d at 628-32 (rejecting constitutional challenge to House rule permitting delegates to vote in Committee of the Whole House).

The rule proposed by the Solicitor General should no more be applied to the Commission than to the Sentencing Commission, which includes the Attorney General as an *ex officio* member even though it is located in the judicial branch, *Mistretta*, 488 U.S. at 384.[6] *See*

of party found to have engaged in discrimination until 30 days after submitting a full report to Congress).

[6] There is, for example, no less likelihood on the Sentencing Commission than on the Federal Election Commission that the voting members might treat *ex officio* members "as *colleagues* (rather than as members of a separate Branch of government)" (Amicus Br. 19, emphasis in original). While such speculation about subtle psychological perceptions does not appear to be relevant to assessing the constitutional distribution of governmental powers, we note that the distinct status and lack of authority of the *ex officio*

also 20 U.S.C. §§ 42, 43 (designating Chief Justice of the United States as *ex officio* member of the Smithsonian Institution Board of Regents). If anything, the Attorney General's participation in the Sentencing Commission carries greater potential to influence the actions of one branch to serve the conflicting interest of another branch, for the Sentencing Commission promulgates guidelines that govern the sentencing decisions of federal judges in criminal cases to which the Department of Justice is almost always a party. In *Mistretta*, this Court explicitly noted that assignment to the executive branch of actual authority to promulgate sentencing guidelines might well be an unconstitutional encroachment on the judicial function. 488 U.S. at 391 n.17. Yet the *Mistretta* Court also noted with approval that the Attorney General's *ex officio* membership gave the executive branch greater involvement in the Sentencing Commission than in other independent agencies outside the judicial branch. 488 U.S. at 387 n.14. If there had been a "bright-line" rule equating the persuasive influence possible through *ex officio* membership with unconstitutional control of another branch's actions, the constitutional question the Court found it unnecessary to address in *Mistretta*, 488 U.S. at 391 n.17, would have been directly presented.

This conclusion cannot be avoided, as the Solicitor General urges (Br. 22-23), by arguing that the Constitution is less restrictive of executive encroachment on the judiciary than of legislative encroachment on the executive. Although this Court has closely scrutinized statutes alleged to enhance congressional power because of the legislature's "greater facility" to "mask" such effects "under complicated and indirect measures," *Metropolitan Washington*, 501 U.S. at 274 (quoting The Federalist No. 48, at 333 (J. Madison) (J. Cooke ed. 1961)), the Court has never suggested that the substantive con-

members of he Federal Election Commission is graphically reinforced every time the Commission takes a vote.

stitutional protections against encroachment into another branch's assigned responsibilities are more relaxed for the executive branch than for the legislative.[7]

Proceeding " 'beyond form to the substance of what' Congress has done," *Schor*, 478 U.S. at 854 (citation omitted), the Solicitor General suggests only one way in which the mere presence of the *ex officio* members "threatens to impede the voting Commissioners in the independent exercise of their statutory responsibilities" (Amicus Br. 20). Invoking the traditional rationale for the executive privilege, the Solicitor General argues (Br. 20-21) that the possibility that the *ex officio* members would report to Congress on the Commission's deliberations might chill candid deliberations among the voting Commissioners.

This argument carries little weight in this case because Congress has determined by statute that most of the Commission's deliberations either be conducted in public or be made available to the public after a proceeding is closed. As noted in our initial brief (p. 20), the *ex officio* members are governed by 2 U.S.C. § 437g(a)(12), which precludes "any person" from disclosing any of the Commission's actions in pending enforcement investigations. *See also* 11 C.F.R. §§ 2.4(a), 111.21. Once those administrative investigations are finally closed, audio tapes of most of the Commission's deliberations are made available to any member of the public pursuant to the Government in the Sunshire Act ("Sunshine Act"), 5 U.S.C. § 552b, and/or the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. *See* 11 C.F.R. § 2.6. Pur-

[7] Far from suggesting that executive encroachment is less dangerous than legislative, the Court has noted the "dramatic evidence of the threat to liberty posed by a too powerful executive" set out in the Declaration of Independence, and has construed Madison's statement in The Federalist No. 48 as recognizing that "the representatives of the majority in a democratic society, if unconstrained, may pose a similar threat," *Metropolitan Washington*, 501 U.S. at 273.

suant to the Sunshine Act, the Commission conducts its deliberations in most other matters in public session. *See* 11 C.F.R. § 2.3(b).[8] If the prospect of public disclosure has any adverse impact upon the Commission's decisionmaking, these statutes ensure that it would not be altered appreciably by barring the *ex officio* members from the Commission's meetings.

2. Respondents have little to add to the Solicitor General's argument other than hypothesizing (NRA Br. 14-15) that ruling in favor of the Commission here might authorize Congress to place its agents at the President's Cabinet table and in this Court's deliberative conferences. This argument completely disregards this Court's focus on " 'the extent to which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned functions.' " *Mistretta*, 488 U.S. at 383 (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)). As discussed *supra*, p. 2, the Court has refused to adopt categorical restrictions in this area of the law merely "out of fear of where some hypothetical 'slippery slope' may deposit us." *Schor*, 478 U.S. at 852.

Permitting nonvoting *ex officio* members on the Federal Election Commission clearly would not mean that the Constitution also permits Congress to place its agents in the President's Cabinet or in this Court's conferences, even in an *ex officio* capacity. Unlike the Commission, which is a creature of statute empowered by Congress, both the President and this Court derive their fundamental authority directly from the Constitution. For example, while Congress has required the Commission to make public most of its deliberations in administering the Act,

[8] The Commission routinely deliberates in public session on such matters as proposed regulations, advisory opinions to be issued under 2 U.S.C. § 437f, and public financing determinations under 26 U.S.C. §§ 9005, 9007(b), 9036, and 9038(b).

see pp. 7-8, *supra*,[9] this Court has recognized that the President's privilege of confidentiality in discussions with his associates and advisors "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). *See* U.S. Const., Art. II, § 2.[10] Similarly, although this Court has concluded that Congress can create independent agencies performing executive functions and restrict the President's power to remove their members, *Morrison*, 487 U.S. at 687-691, it has noted that "there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." *Id.* at 690.

The contrast between this Court's constitutional role and the Commission's statutory enforcement authority is even more pronounced, for the Commission's activities pose no "threat to the 'impartial and independent federal adjudication of claims within the judicial power of the United States.' " *Morrison*, 487 U.S. at 683 (quoting *Schor*, 478 U.S. at 850). The provision in Art. III, § 1 for lifetime tenure without diminution in compensation for federal judges demonstrates the Framers' particular concern that the federal judicial power be insulated from influence by the political branches. In contrast, the Commission here has performed only a civil prosecutorial

[9] "[T]he regulation and mandatory disclosure of documents in the possession of the Executive Branch . . . has never been considered invalid as an invasion of its autonomy." *Nixon v. Administrator of General Services*, 433 U.S. at 445 (citing, *inter alia*, the FOIA and the Sunshine Act).

[10] *See also Public Citizen*, 491 U.S. at 451-67 (narrowly construing the Federal Advisory Committee Act, 5 U.S.C. App. 2, §§ 1-15, to avoid constitutional concerns about interference with the President's confidential communications); *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2775-76 (1992) (Administrative Procedure Act); *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909-10 (D.C. Cir. 1993).

function; the Act reserves adjudication of whether Respondents violated the Act to an independent federal judge. 2 U.S.C. § 437g(a)(6).[11]

In sum, this is a highly fact-dependent area of constitutional law, in which the determinative issue is whether the particular statutory scheme at issue unduly "impede[s] the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." *Morrison*, 487 U.S. at 691. The *ex officio* members of the Commission present no threat to the ability of the President to perform his constitutional duties, and Congress could reasonably conclude that the institutional expertise of the Secretary and the Clerk is relevant to the substantive jurisdiction of the Federal Election Commission in a manner that would not be true for any other independent agency.[12] Although the composition of the Commission is unusual, "[o]ur constitutional principles of separated powers are not violated . . . by mere anomaly or innovation." *Mistretta*, 488 U.S. at 385.

II. THE COMMISSION'S PAST ACTIONS SHOULD BE ACCORDED *DE FACTO* VALIDITY

1. The Solicitor General (Br. 27-28) and the Respondents (Br. 19-34) debate at length the extent to which this

[11] Even the Commission's adjudicative decisions are not final, but are subject to review by a federal court. *See* 26 U.S.C. §§ 9011(a), 9041(a).

[12] *See, e.g.*, 2 U.S.C. § 439a (generally prohibiting personal use of campaign funds, except for "ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office"); 2 U.S.C. § 432(g) (reports to be filed by candidates with the Secretary or the Clerk, and then forwarded to the Commission). *See also Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986) (distinguishing constituent communications of incumbent Congressman from campaign communications regulated by the Act); *FEC v. Wright*, 777 F. Supp. 525 (N.D. Tex. 1991) (overlap of former provision of the Act with internal House rules). *See also* FEC Br. 20-21 n.11.

Court's recent precedents permit prospective decisionmaking in appropriate cases. We believe the Solicitor General is correct but, as noted in our opening brief (p. 31 n.21), this case does not require the Court to resolve that issue.

As our opening brief makes clear, we have not asked the Court to issue a prospective decision in this case. Nor have we suggested that this Court should affirm the district court's judgment, as Respondents assert (Br. 18); since the merits of that decision were never reviewed by the court of appeals it is not even ripe for consideration here (FEC Br. 33). Instead, we have argued that, if the Court finds the *ex officio* provision unconstitutional, it should remand the case to the court of appeals with instructions to proceed to consider the merits of the allegations against Respondents only at the behest of a reformed Commission acting without *ex officio* members. While it is certainly understandable that Respondents would prefer to escape all liability for the serious violations of the Act found by the district court, they have failed to contravene the showing in our opening brief that this would be an adequate remedy for their narrowly focused constitutional claim, which would not sacrifice the public interest in the uninterrupted enforcement of the Act.

Respondents have found no authority requiring that relief on a constitutional claim go any further than necessary to protect a party's substantive rights from being prejudiced by the constitutional defect found. Even a criminal defendant who prevails on a constitutional claim not involving sufficiency of the evidence is not ordinarily entitled to dismissal of the charges against him, but only to a retrial free of the constitutional defect. *See, e.g., Bullington v. Missouri*, 451 U.S. 430, 442 (1981); *Lockhart v. Nelson*, 488 U.S. 33, 40 (1988). Thus, in *Griffith v. Kentucky*, 479 U.S. 314 (1987), the case featured by Respondents (Br. 20-21) as establishing the

requirement of retroactive decisionmaking in criminal cases, the Court did not require the dismissal of the charges against the defendant, but remanded for further proceedings that resulted in a retrial. *See United States v. Brown*, 817 F.2d 674, 676 (10th Cir. 1987). In fact, if the Court finds a constitutional defect, but it is shown not to have affected the outcome of the trial, the defendant is not even entitled to have the conviction set aside. *See, e.g., Chapman v. California*, 386 U.S. 18, 22-24 (1967) (discussing "harmless-constitutional-error rule"); *Delaware v. Van Arsdall*, 475 U.S. 673, 680-84 (1986) (same).[13]

This shows that there is no merit in Respondents' insistence that any remedy short of dismissal of the charges against them in this civil suit would render the judgment nonretroactive. In fact, in *Harper v. Virginia Dep't of Taxation*, 113 S.Ct. 2510 (1993), the Court stated that it had engaged in retroactive decisionmaking by applying a new "rule of law" adopted in a previous decision to a second case that was then pending on appeal, 113 S.Ct. at 2517, even though the Court did not enter judgment for the petitioner because other legal rules might still be available that would limit the relief to be provided on remand, 113 S.Ct. at 2519-20. Thus, the Commission's argument in this case—that the Court should apply the

[13] It bears repeating in this regard that, as the Solicitor General noted (Br. 26), "Respondents in the present case do not quarrel with the manner in which the Commission processed their case" and "do not contend . . . that the presence of the Secretary and Clerk somehow tilted the Commission's proceedings in this case in a manner adverse to their interests." Respondents did not even object to the participation of the *ex officio* members while the administrative proceeding was still pending before the Commission. Since there is no claim before this Court that the judgment entered by the district court was not fairly reached, it is unnecessary to throw out this entire case in order to remedy Respondents' narrow claim that they cannot have a binding judgment entered against them in a civil law enforcement suit brought by a federal agency that includes *ex officio* members.

de facto validity doctrine of *Buckley v. Valeo*, 424 U.S. 1, 142 (1976), in fashioning the remedy for Respondents' constitutional claim—is entirely consistent with the retroactivity principles discussed in *Harper*.[14]

If a reformed Commission continued, in the absence of the *ex officio* members, to believe that the case has merit and should be pursued, any final judgment the courts may thereafter enter on the merits would be at the behest of an agency that satisfies all of Respondents' objections. Respondents' perception (Br. 40 n.24) that the voting Commissioners are not likely to view the merits of this case any differently even in the absence of the *ex officio* members does not make this relief meaningless. Instead, it merely supports our argument (FEC Br. 28-29) that the presence of the *ex officio* officers was always peripheral to the independent decisionmaking by the voting Commissioners, who have always been *de jure* officers of the United States. That fact makes this an even stronger case for according *de facto* validity to the Commission's prior actions than *Buckley* was, since in that case it was the voting Commissioners themselves whose presence on the Commission was found unconstitutional.

2. The short answer to Respondents' arguments that *de facto* validity cannot be accorded the Commission's past actions here either because of the nature of their constitutional claim (Br. 34-38) or because the *de facto*

[14] *Harper* would not even require that the new "rule of law" adopted by the court of appeals, that the Commission cannot include *ex officio* members, be applied retroactively to the administrative investigation completed by the Commission prior to the filing of this lawsuit. *Harper* only requires retroactive application in "cases still open on direct review," 113 S.Ct. at 2517. This lawsuit is a *de novo* law enforcement suit, which does not involve judicial review of the administrative investigation that preceded it. *See generally, Chandler v. Roudebush*, 425 U.S. 840, 852-54 (1976) (discussing difference between *de novo* judicial action and review of agency decision). Since the administrative proceeding is not "still open on direct review," *Harper* would only require application of a ruling on the *ex officio* provision to the Commission's actions in this litigation.

officer rationale cannot be used in fashioning a remedy (Br. 38-40), is that the Court has already found that remedy proper in *Buckley v. Valeo*, 424 U.S. at 142. In that case this Court ruled that the Commission's original structure violated separation of powers, but it fashioned a remedy that accorded *de facto* validity to the Commission's prior actions.[15]

The *de facto* officer rationale obviously has no application to cases such as *INS v. Chadha*, 462 U.S. 919 (1983), *Harper*, 113 S.Ct. 2510 (1993), or *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), in which the substantive legal effect of particular actions, rather than the validity of an agency or official, is at issue. Indeed, in *Buckley* itself the Court did not purport to make its substantive constitutional rulings prospective, but recognized as valid only actions of the Commission to enforce "those provisions [of the Act] the Court sustains." 424 U.S. at 143. Since *Buckley*, the courts have continued to follow the *de facto* validity rule in fashioning remedies for constitutional decisions "invalidating governmental bodies." *Metropolitan Washington Airports Authority Professional Fire Fighters Ass'n Local 3217 v. United States*, 959 F.2d 297, 305 (D.C. Cir. 1992).[16] *See also*

[15] The *Buckley* decision was, as the court of appeals recognized (Pet. App. 17a), based on the *de facto* officer rationale rather than on notions of prospective decisionmaking. The Court explicitly relied upon decisions recognizing *de facto* validity of "legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan," 424 U.S. at 142, and did not even mention the test for prospective decisionmaking set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Respondents' contention (Br. 29) that the *Buckley* decision was not intended to validate Commission enforcement actions is belied by the Court's explicit extension of its ruling to permit the Commission to continue operating *de facto* for 30 days to enable Congress to reconstitute the Commission "without interrupting enforcement of the provisions [of the Act] the Court sustains," 424 U.S. at 143.

[16] *Local 3217* makes clear, 959 F.2d at 304, that contrary to Respondents' assertion (Br. 33-34, 39), this Court's decision in *Metropolitan Washington*, 501 U.S. 252 (1991), did not reverse the

In re Application of the President's Comm'n on Organized Crime, 763 F.2d 1191, 1201-02 (11th Cir. 1985) (Fay, J.); *Hechinger v. Metropolitan Washington Airports Authority*, 1994 WL 520018, *10 (D.C. Cir., Sept. 27, 1994).

Respondents' argument (Br. 38-42) that the *de facto* officer doctrine is inapplicable where there is no *de jure* office to be filled has no relevance to the facts of this case. Respondents have not contested the finding of the court of appeals (Pet. App. 16a-17a) that the *ex officio* provision is severable from the remainder of the statute, so that the Commission can continue to function as a federal agency with only the six members appointed by the President, without any need for legislative action. The federal offices filled by the six voting Commissioners have been *de jure* offices all along, and the individuals who performed the functions of those offices were *de jure* officers at every stage of this case. Nor did the decision of the court of appeals invalidate the Commission as an institution; it only required a modification of the structure of the agency, which otherwise continues to exist as a *de jure* institution of government. In short, since the constitutional defect found by the court of appeals was not in the creation of the Commission or in the appointment of the voting Commissioners, but only in the possibility that agents of Congress might improperly influence the *de jure* executive decisionmakers, Respondents' argument has no merit.[17]

application of *de facto* validity pursuant to *Buckley* by the court of appeals in that case.

[17] In *Norton v. Shelby County*, 118 U.S. 425 (1886), upon which Respondents primarily rely (Br. 34-38), the Court explicitly recognized that the *de facto* officer doctrine applies in cases where " 'there was a want of power in the . . . appointing body' " or where an official was " 'appoint[ed] by or pursuant to a public, unconstitutional law, before the same is adjudged to be such.' " *Id.* at 446 (citation omitted). While none of the agency actions implicated here was taken by the *ex officio* members, Congress's allegedly

3. Respondents argue (Br. 40-42) that the Restatement (Second) of Agency would not permit a reformed Commission to ratify its prior actions. As our prior discussion makes clear, the *de facto* validity doctrine of *Buckley* would recognize the Commission's prior acts as valid without any need for such ratification, and Respondents would receive adequate relief on their claim if the Commission is reformed and then has an opportunity to decide, in the absence of the *ex officio* members, whether or not the merits of the case justify continuing to pursue it. *See* FEC Br. at 31 (discussing Fed. R. Civ. P. 25(d)). *See also, e.g., Irwin v. Wright*, 258 U.S. 219, 224-25 (1922); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947) (applying Fed. R. Civ. P. 25); *Hoptowit v. Spellman*, 753 F.2d 779, 781-82 (9th Cir. 1985).

If the Court were to conclude that ratification of the Commission's prior actions is necessary, however, there is nothing in the Restatement (Second) of Agency that would prevent the Court from so ruling. Respondents' argument rests on the fiction that a reformed Commission would be an entirely different entity, analogous to two unrelated individuals. We have shown above, however, that under the decision of the court of appeals a reformed Commission is an ongoing entity, whose actions continue to be determined by the same six *de jure* officers as before, but no longer in the presence of agents of the Congress. Thus, rather than ratifying the actions of strangers, the reformed Commission would be ratifying its own prior decisions—decisions that these *same officers* would have been lawfully authorized to make before in the absence of the Secretary and the Clerk. None of Respondents' arguments against ratification is remotely applicable to such a situation.

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unconstitutional designation of its own agents to serve as *ex officio* members of the Commission would fall into these categories even if they had been.

III. THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED

Respondents question (Br. 6, 9-11) whether the Commission's petition for writ of certiorari was timely filed. They acknowledge (Br. 9) that the Commission filed the petition within the 90-day period specified by 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.1, but they suggest that the submission was unauthorized and thus cannot be deemed a timely filing for jurisdictional purposes. As the Commission explained in the brief it filed on this issue on May 31, 1994, however, Congress granted the nonpartisan Commission complete independent civil litigating authority as part of the reforms it enacted in the wake of the Watergate scandal. The Commission properly exercised that authority in filing the petition in this case.[18]

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[18] Although the Commission did not request the Solicitor General to do so, he authorized the Commission's General Counsel to litigate this case in this Court. Contrary to Respondents' arguments (Br. 9-10), 28 U.S.C. § 518(a) and 28 C.F.R. § 0.20 neither impose any temporal limitation on the Solicitor General's plenary authority to authorize others to represent the government in this Court, nor incorporate by reference the views on the general law of agency set out in the Restatement (Second) of Agency. *Cf. United States v. Winston*, 170 U.S. 522, 525 (1898). Finally, since the petition was timely filed in this case, there is no basis for Respondents' concern (Br. 10 n.5) that this case could empower the Solicitor General to authorize petitions to be filed out of time.

CONCLUSION

For the reasons stated above and in the Commission's initial brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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No. 93-1151

In the Supreme Court of the United States

OCTOBER TERM, 1994

FEDERAL ELECTION COMMISSION, PETITIONER

v.

NRA POLITICAL VICTORY FUND, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether constitutional separation-of-powers principles are violated by the ex officio, non-voting membership on the Federal Election Commission of the Secretary of the Senate and the Clerk of the House of Representatives.

2. Whether, if Question 1 is answered in the affirmative, the Commission's prior actions (including the civil penalty imposed in this case) should nevertheless be given de facto validity.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1151

FEDERAL ELECTION COMMISSION, PETITIONER

v.

NRA POLITICAL VICTORY FUND, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Both issues presented by this case are of considerable importance to the United States. The United States has a substantial interest in questions involving the application of constitutional separation-of-powers principles, and particularly in questions regarding the power of Congress to place its agents as members of entities within the Executive Branch. The United States also has a substantial interest in continued recognition of the principle that, under appropriate circumstances, the prior acts of a governmental actor may be accorded de facto validity even if it has been determined that the actor's appointment was legally flawed. At the Court's invitation, the United States filed a brief amicus curiae

at the petition stage of this case, addressed solely to the question whether the Federal Election Commission has statutory authority to represent itself in this case in this Court.[1]

STATEMENT

1. The Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, substantially altered the legal regime governing presidential and congressional election campaigns. The 1974 statute amended the Federal Election Campaign Act of 1971 (FECA or Act) to provide, *inter alia*, that civil enforcement of federal election laws would be entrusted to the newly established Federal Election Commission (FEC or Commission). The statute provided that the Commission would be composed of the Secretary of the Senate and the Clerk of the House of Representatives, ex officio and without the right to vote, and six additional members. Two of these members would be appointed by the President pro tempore of the Senate, two by the Speaker

[1] Although the United States disagrees with the Federal Election Commission regarding the proper disposition of the separation-of-powers issue posed by this case, the Solicitor General has authorized the Commission to file a petition for a writ of certiorari and to represent itself in this Court. On prior occasions the Solicitor General has deemed it appropriate to authorize federal agencies to file briefs in this Court on their own behalf asserting positions contrary to those of the United States. See, *e.g.*, *Dirks* v. *SEC*, 463 U.S. 646, 648 n.* (1983) (Securities and Exchange Commission authorized by Solicitor General to file brief defending the judgment of the court of appeals, although Solicitor General filed a brief urging reversal); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 367 n.* (1973) (Federal Power Commission authorized by Solicitor General to file brief amicus curiae supporting position contrary to that asserted by the United States).

of the House of Representatives, and two by the President. All would be subject to confirmation by a majority vote in both Houses. See 2 U.S.C. 437c(a)(1) (Supp. V 1975); see Pub. L. No. 93-443, § 208(a), 88 Stat. 1280-1281.

In *Buckley* v. *Valeo*, 424 U.S. 1, 109-141 (1976) (per curiam), the Court held that this scheme violated the Appointments Clause, Art. II, § 2, Cl. 2. The Court held in particular that "[t]he Commission's enforcement power, exemplified by its discretionary power to seek judicial relief," 424 U.S. at 138, could be exercised only by "Officers of the United States," selected in conformity with the Appointments Clause, *id.* at 124-141. The Court suggested as well that the method by which the voting commissioners were appointed violated more general separation-of-powers principles. *Id.* at 118-124. Significantly, however, the Court concluded that "the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date * * *. The past acts of the Commission are therefore accorded *de facto* validity." *Id.* at 142.

In response to this Court's decision in *Buckley*, Congress again amended the FECA. The statute, *inter alia*, reestablished the FEC:

> There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under

this paragraph may be affiliated with the same political party.

Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101(a), 90 Stat. 475, codified as amended at 2 U.S.C. 437c(a)(1).

The Commission possesses wide-ranging authority to administer the federal election laws.[2] The present case involves the FEC's exercise of its power to seek civil penalties. The Act provides that, "[i]f the Commission * * * determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of [the FECA] or chapter 95 or chapter 96 of title 26," the Commission "shall make an investigation of such alleged violation," 2 U.S.C. 437g(a)(2), and may attempt to resolve the matter through a voluntary conciliation agreement, 2 U.S.C. 437g(a)(4)(A). If efforts to achieve a voluntary agreement fail, "the Commission may, upon an affirmative vote of 4 of its members, institute a civil

[2] As was true prior to *Buckley* v. *Valeo*, the Commission's broad-ranging powers fall generally into three categories. See 424 U.S. at 109-113, 137-143. First, the Commission exercises powers of an investigative or informative nature, including recordkeeping, investigative, and disclosure functions. See, *e.g.*, 2 U.S.C. 437d(a)(1)-(5) and (9), 438(a) and (b). In addition, the Commission performs a variety of administrative functions, including rulemaking (see 2 U.S.C. 437d(a)(8), 438(a)(8)), the rendering of advisory opinions (see 2 U.S.C. 437d(a)(7), 437f), and formulation of general policy (see 2 U.S.C. 437c(b)(1)). Finally, the Commission is entrusted with "exclusive jurisdiction with respect to the civil enforcement of [the Act and Chapter 95 and Chapter 96 of Title 26]." 2 U.S.C. 437c(b)(1); see *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 485, 489 (1985); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 198 n.2 (1982).

action for relief" in federal district court. 2 U.S.C. 437g(a)(6)(A).

2. This case began as an enforcement action brought by the FEC against various entities and an officer of the National Rifle Association (NRA). The NRA's Institute for Legislative Action (ILA) conducted mailings in 1988 to raise funds for the Political Victory Fund (PVF), a separate segregated fund of the NRA that provides financial support to candidates for election. See Pet. 5-6. The PVF reimbursed the ILA for the cost of those mailings, but the ILA subsequently transferred an identical amount to the PVF. See Pet. App. 2a-3a. The FEC concluded that this transaction violated 2 U.S.C. 441b(a), which prohibits corporate contributions and expenditures in connection with federal elections. See 11 C.F.R. 114.5(b).

After unsuccessful negotiations with the NRA, the FEC brought this civil enforcement action against NRA entities and one of its officials. Respondents asserted three constitutional challenges to the statute establishing the Commission. First, respondents argued that the Act impermissibly restricts the President's nomination power by requiring that no more than three of the six voting members of the Commission can be affiliated with the same political party. Second, they asserted that, in the absence of any statutory provision authorizing removal of commissioners by the President, the Commission's civil enforcement powers encroach on the President's authority to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3. Third, they contended that by making the Secretary of the Senate and the Clerk of the House of Representatives ex officio members of the Commission, Congress had exceeded its authority under Article I. See Pet. App. 3a-6a.

The district court rejected these arguments on standing grounds. It concluded that "it is the President and not the [respondents] who can challenge alleged infringements of presidential powers because only the President's interests are affected." Pet. App. 24a. It stated that "ultimately, [respondents] have raised an issue that bears on the rights of a third party, namely the President, and not on their own legal interests," *id.* at 26a; it noted as well that respondents had "not alleged that the Secretary and the Clerk were even present for or participated in the proceedings in question," *ibid.* The district court granted summary judgment in favor of the Commission on the merits of the enforcement action and awarded declaratory and injunctive relief and assessed a financial penalty of $40,000. *Id.* at 27a-28a, 29a-30a, 31a-34a, 35a.

3. The court of appeals reversed. Pet. App. 1a-18a. It held that respondents had standing to raise two of their constitutional claims, *id.* at 6a-11a,[3] and that the ex officio membership of congressional officers—the Secretary and Clerk—violated separation-of-powers principles, *id.* at 13a-16a. The court concluded that the only conceivable purpose of this membership was to influence the Commission, and that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution." *Id.* at 15a (citing *Metropolitan Washington Airports Auth.* v. *Citizens*

[3] The Court concluded, however, that respondents' challenge to the statutory restrictions on party affiliation was not justiciable. Pet. App. 8a-11a. It rejected respondents' contention that the Commission's independence unconstitutionally limited the President's authority to execute the laws, concluding that the statute could properly be construed to afford the President constitutionally sufficient power to remove commissioners from their positions. See *id.* at 11a-12a.

for Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991)). It rejected the FEC's argument that "Congress intended *ex officio* membership to fulfill [a] coordinating function by having the Secretary and the Clerk play a mere 'informational or advisory role' in agency decisionmaking," Pet. App. 15a, explaining:

> Advice, however, surely implies influence, and Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role. In that capacity, Congress enjoys ample channels to advise, coordinate, and even directly influence an executive agency. It can do so through oversight hearings, appropriation and authorization legislation, or direct communication with the Commission. What the Constitution prohibits Congress from doing, and what Congress does in this case, is to place its agents 'beyond the legislative sphere' by naming them to membership on an entity with executive powers.

Id. at 15a-16a (citation and footnote omitted). The court held that the de facto officer doctrine could not be used to redeem the Commission's actions in this enforcement proceeding. It explained that respondents "raise the constitutional challenge as a defense to an enforcement action, and we are aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the [respondents] in this case." *Id.* at 17a-18a.[4]

[4] On October 26, 1993, four days after the court of appeals' decision, the Commission "reconstituted itself as a body of six voting members subject to further judicial action." 58 Fed. Reg. 59,640 (1993). Shortly thereafter, the reconstituted Commission issued orders ratifying the FEC's existing forms and regulations, *id.* at 59,640-59,641, and announcing that its past advisory opinions

SUMMARY OF ARGUMENT

1. The membership on the Federal Election Commission of the Secretary of the Senate and the Clerk of the House of Representatives violates constitutional separation-of-powers principles. As Commission members, these congressional officers are entitled to all the prerogatives of membership not specifically proscribed. The legislative history evidences Congress's expectation that these officials would play a substantial role in the Commission's exercise of its duties. Such placement of congressional agents on an Executive Branch entity threatens "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976) (per curiam).

These constitutional principles are not rendered inapplicable because the Secretary and Clerk do not have the right to vote. This Court's decisions make clear that Congress may not exert control, whether formally or "in effect," over the exercise of executive authority. Congress therefore may not make its agents members of a body if that entity possesses functions and powers that Congress may not exercise itself. By giving congressional agents the influence that comes from participation in all the deliberations of an Executive Branch agency, Congress has improperly enlarged its own power beyond the legislative sphere. The presence of congressional agents as members of an Executive Branch agency also threatens to impair the Commission's independent conduct of its responsibilities.

2. Even though the ex officio membership of the Secretary and Clerk violates separation-of-powers

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would continue to be given the same precedential effect as before the court of appeals' decision, *id.* at 59,642.

principles, the Court should—as it did in *Buckley* v. *Valeo*—accord de facto validity to the Commission's previous acts, including the civil penalty imposed in this case. That disposition would be consistent with the Court's longstanding application of the "de facto officer doctrine," which gives validity to acts of officers regardless of any defects in the legality of their appointment or election. Prospective application of the Court's decision would be especially appropriate in the present case, since any connection between the Commission's unlawful composition and the judgment ultimately entered against respondents is far too attenuated to outweigh the public interest in effective implementation of the federal campaign laws.

ARGUMENT

I. THE MEMBERSHIP ON THE COMMISSION OF THE SECRETARY OF THE SENATE AND THE CLERK OF THE HOUSE OF REPRESENTATIVES VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS

A. 1. The Federal Election Commission was established by Congress to "administer, seek to obtain compliance with, and formulate policy" with respect to the Federal Election Campaign Act of 1971, as amended, and Chapters 95 and 96 of Title 26. 2 U.S.C. 437c(b)(1). See pages 2-5, *supra*. The Commission's enforcement power is "both direct and wide ranging" and substantially independent of the Attorney General and the Department of Justice. See *Buckley* v. *Valeo*, 424 U.S. 1, 111-113 (1976) (per curiam). The decision whether to undertake enforcement actions rests solely with the

Commission[5] (which also possesses independent litigating authority with respect to various provisions of the Act and Chapters 95 and 96 of Title 26). See 2 U.S.C. 437d(a)(6); 26 U.S.C. 9010(d), 9040(d). In *Buckley*, this Court held that the Commission's enforcement powers and administrative functions are of a type that may be exercised only by Executive Branch "Officers of the United States" appointed pursuant to Article II, § 2, Cl. 2, of the Constitution. 424 U.S. at 137-141.

2. All decisions of the Commission must be made by a majority of the voting members, with an affirmative vote of four members required to initiate or appeal civil actions, to render advisory opinions, to develop or alter rules or forms, and for certain other acts. See 2 U.S.C. 437c(c). The Secretary and Clerk do not have the right to vote on Commission actions. In all other respects, however, the statute describes these officials as "members" of the Commission. See 2 U.S.C. 437c(a)(3)-(5) (providing that "members (other than the Secretary of the Senate and the Clerk of the House of Representatives)" are subject to specified limitations and privileges). This Court in *Buckley* also so characterized them, stating that the Commission "consists of eight members. The Secretary * * * and the Clerk * * * are *ex officio* members of the Commission without the right to vote." 424 U.S. at 113 (footnote omitted); see also *id.* at 267-268 (White, J.). As

[5] Responsibility for criminal enforcement of federal election laws remains with the Department of Justice. The Commission may refer to the Attorney General knowing and willful violations of the Act, or of Chapter 95 or 96 of Title 26, if it finds probable cause to believe that such a violation has occurred or is about to occur. 2 U.S.C. 437g(a)(5)(C). The Attorney General is then obliged to report any actions taken with respect to the apparent violation. 2 U.S.C. 437g(c).

members, the Secretary and Clerk are entitled to all the prerogatives of membership not specifically proscribed. Thus, they may attend and participate fully in the Commission's meetings and discussions (see 2 U.S.C. 437c(d)) concerning the exercise of any of its functions (including the bringing of an enforcement action), assist in the formulation of the Commission's internal rules and procedures (see 2 U.S.C. 437c(e)),[6] and participate in

[6] The rules employed by the Commission at the time of the court of appeals' decision (prior to the reconstitution of the FEC as a body of six voting members, see note 4, *supra*), purported to exclude the Secretary and Clerk from the definition of "member." Directive No. 10, Federal Election Campaign Financing Guide (CCH) ¶ 2043, at 2512 (1989) (subpart A(1)). Under these rules, the Secretary and Clerk could not call meetings in addition to those required by statute (*id.* subpart A), contrast 2 U.S.C. 437c(d) ("The Commission shall meet at least once each month and also at the call of any member."); did not contribute to the presence or absence of a quorum (Directive No. 10, *supra*, ¶ 2043, at 2512 (subpart B)); and could not request that motions be reduced to writing or vote on certain motions (*id.* at 2512-2513 (subpart E)). It is unclear under the rules whether opposition by an ex officio member to adoption of a matter would compel that a vote be taken prior to its adoption (*id.* at 2513 (subpart G)).

As "Commissioner[s]," however, the ex officio members appear to have possessed the right to speak as a matter of personal privilege under the rules. Directive No. 10, *supra*, ¶ 2043, at 2513 (subpart F); compare 11 C.F.R. 5.1(b) ("Commissioner" includes Secretary and Clerk for purposes of considering public access to documents) with 11 C.F.R. 7.2(b) ("Commissioner" limited to voting members for purposes of provisions regarding standard of conduct). The FEC also subscribes to Robert's Rules of Order Newly Revised (1970), see Directive No. 10, *supra*, ¶ 2043, at 2514 (subpart K). Under Robert's Rules of Order, no member can be precluded from attending meetings except where he or she has run afoul of bylaws or is properly subject to discipline. See *id.* § 60, at 539; cf. *id.* § 46, at 386 (honorary members have the right to

personnel decisions and in the Commission's coordination with other Executive Branch entities (see 2 U.S.C. 437c(f)). They may also participate in writing the Commission's advisory opinions, which exempt specified persons from liability for conduct undertaken in good faith reliance on the opinion, even if that conduct is later determined to constitute a violation of the FECA. See 2 U.S.C. 437f.

The legislative history of the FECA further evidences Congress's expectation that the Secretary and Clerk would play a broad role in the Commission's exercise of its functions, despite the absence of voting power. Under the prior statutory scheme (the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972)), the Secretary and Clerk were given a broad range of duties, including the responsibility for reporting apparent violations of law, the authority to direct the Attorney General to institute civil actions, and rule-making and regulatory functions. Pub. L. No. 92-225, §§ 301(g), 308, 86 Stat. 12, 16-18. The creation by the 1974 Amendments of an eight-member Commission (on which the Secretary and Clerk were included as non-voting members) was prompted in part by concerns that these officials had executed their responsibilities in an inefficient and partisan fashion.[7] See Pub. L. No. 93-443, § 208(a), 88 Stat. 1280; see also H.R. Rep. No. 1438, 93d Cong., 2d Sess. 88-90 (1974).

Immediately following this Court's decision in *Buckley*, Congress considered legislation that would re-

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attend meetings and to speak, but not to make motions or vote unless that authority is specifically provided).

[7] See, *e.g.*, H.R. Rep. No. 1239, 93d Cong., 2d Sess. 131-133 (1974) (supp. views of Rep. Frenzel); 120 Cong. Rec. 27,507 (1974) (Rep. Broyhill).

establish the Commission in a manner consistent with the Appointments Clause. When the Senate debates began, Senator Griffin introduced an amendment that would have eliminated the Secretary and Clerk as Commission members. 122 Cong. Rec. 6691 (1976). To explore the intended scope of the participation of the ex officio members, Senator Mansfield incorporated into the record a letter from the incumbent Secretary of the Senate, who explained that his present role (and the role of his full-time designee) was to represent the interests of the Senate in a variety of ways. *Id.* at 6705. The Secretary also reported the views of the present commissioners that "ex officio members should have all rights and privileges and responsibilities of the other Commissioners, except the right to vote." *Ibid.*

After further exchange (122 Cong. Rec. 6705-6706 (1976)), Senator Mansfield secured Senator Cannon's agreement that the Secretary was to serve "in connection with Senate campaign matters which come within the purview of the Commission and that the law permits the Secretary to advise with, discuss, question and, except for the right to vote, participate fully in the proceedings of the Commission in this respect." *Id.* at 6940. Senator Griffin's view was solicited, and he stressed the committee's intent that "to the extent of constitutionality" the Secretary and Clerk would be participating (but non-voting) members of the FEC. Senator Mansfield agreed, and Senator Allen added that the Secretary "would have the full right to advise with the Commission and to participate in any discussion or in any matter coming before the Commission; to give his advice, arising from his expertise in this area, but not to have the right to cast a vote." *Ibid.*

Following conference on the Senate bill, Representative Brademas indicated agreement with the Senate's

assessment of the ex officio members. Representative Brademas noted that the bill would change the method by which the six voting members were selected (in response to *Buckley*), but stated that

> [i]n other respects, * * * the makeup of the Commission will remain essentially unchanged. The Clerk of the House and the Secretary of the Senate will continue to serve on the Commission, ex officio. The Clerk and Secretary will not have the right to vote, but otherwise will be accorded all of the other rights, including participation in Commission meetings, which belong individually to the six Presidentially appointed Commissioners.

122 Cong. Rec. 12,203 (1976).[8]

B. This Court held in *Buckley* that many of the functions performed by the FEC—including the civil enforcement authority at issue in this case—involve the exercise of executive power. See 424 U.S. at 138. In *Bowsher* v. *Synar*, 478 U.S. 714, 722-727 (1986), the Court reaffirmed that officials responsible to Congress may not be vested with authority to execute the laws. See also

[8] While supporting legislation to reestablish the Commission, the Ford administration recommended that the membership of the Secretary and Clerk be eliminated. Testifying before a Senate subcommittee on behalf of the Department of Justice, one administration official explained that "the spirit of the [*Buckley*] opinion, and even the letter of the Constitution, require this result." *Federal Election Campaign Act Amendments, 1976: Hearing Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Admin.*, 94th Cong., 2d Sess. 119 (1976) (*1976 Hearings*) (testimony of Assistant Attorney General Scalia). At a minimum, he stated, the inclusion of congressional officials in the Commission's membership would pose an unacceptable risk of further litigation. *Id.* at 120; see also *id.* at 134-137.

Metropolitan Washington Airports Auth. v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) (*MWAA*) ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it."). It is therefore entirely clear that the Secretary and Clerk could not, consistent with this Court's separation-of-powers decisions, be made voting members of the Commission.[9] The question in this case is whether the absence of voting power renders constitutional the participation of congressional agents on an agency exercising substantial executive powers. We believe that question must be answered in the negative.

1. Although "the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct," *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989), this Court has reviewed with particular vigilance statutory provisions that threaten "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley*, 424 U.S. at 122. "It is this concern of encroachment and aggrandizement that has animated [the Court's] separation-of-powers jurisprudence and aroused [its] vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" *Mistretta*, 488 U.S. at 382 (quoting

[9] The Secretary and Clerk are among the "officers of the Congress" elected by the Members, see 2 U.S.C. 60-1(b); *Buckley*, 424 U.S. at 128 & nn.163-164, and they indisputably function as congressional agents. Indeed, the potential for Legislative Branch control is greater here than in prior cases: neither the individual Members of Congress who served on the Board of Review in *MWAA*, nor the Comptroller General in *Bowsher*, was as responsive to Congress as are the Secretary and Clerk.

INS v. *Chadha*, 462 U.S. 919, 951 (1983)).[10] The records of the Constitutional Convention and the *Federalist Papers*, moreover, particularly emphasize the danger that *Congress* "will aggrandize itself at the expense of the other two branches." *Buckley*, 424 U.S. at 129 & n.166. As James Madison recognized,

> it is against the enterprising ambition of [the legislative] department, that the people ought to indulge all their jealousy and exhaust all their precautions.
>
> * * * Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.

The Federalist No. 48, at 332-334 (J. Cooke ed. 1961). See *MWAA*, 501 U.S. at 273-274. Accord *Bowsher*, 478 U.S. at 727 ("The dangers of congressional usurpation of Executive Branch functions have long been recognized.").

2. *Bowsher* and *MWAA* enunciate two principles that are central to judicial application of the anti-aggrandizement principle. First, Congress may not assert control, whether formally or "in effect," over the exercise of executive authority. See, *e.g.*, *MWAA*, 501 U.S. at 274 (anti-aggrandizement principle aimed at "forestall[ing] the danger of encroachment beyond the legislative sphere") (internal quotation marks omitted); *Bowsher*, 478 U.S. at 734 ("Congress in effect * * * retain[s]

[10] The Court noted in *Mistretta* that it had "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment. 488 U.S. at 382.

control over the execution of the Act and * * * intrude[s] into the executive function. The Constitution does not permit such intrusion.").[11] Second, judicial enforcement of the anti-aggrandizement principle involves the application of bright-line rules, designed to determine whether a particular statutory scheme creates the *potential* for congressional usurpation of Executive Branch functions, rather than a fact-specific inquiry into the actual manner in which that scheme has been implemented. See *Bowsher*, 478 U.S. at 730; see also *MWAA*, 501 U.S. at 269 n.15 ("the likelihood that Congress will discipline Board members by depriving them of committee membership" was "irrelevant for separation-of-powers purposes"); *id.* at 277 (irrelevant that statutory scheme "might prove to be innocuous").

[11] See also *Humphrey's Executor* v. *United States*, 295 U.S. 602, 629 (1935) ("[E]ach of the three general departments of government [must remain] *entirely free from the control or coercive influence, direct or indirect,* of either of the others") (emphasis added); *O'Donoghue* v. *United States*, 289 U.S. 516, 530 (1933) ("[E]ach department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that *the acts of each shall never be controlled by, or subjected, directly or indirectly,* to, the coercive influence of either of the other departments.") (emphasis added). Cf. *Chadha*, 462 U.S. at 951 (the Constitution created three defined Branches "to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility"); *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923) ("The general rule is that neither department may invade the province of the other and neither may *control, direct or restrain* the action of the other.") (emphasis added); 1 *The Works of James Wilson* 367 (James DeWitt Andrews ed., 1896) (each department's proceedings "should be free from the remotest influence, direct or indirect, of either of the two other powers") (*quoted in O'Donoghue*, 289 U.S. at 530).

3. In our view, one such bright-line rule is that Congress may not place its agents as members of a governmental body, even in a non-voting capacity, if that body exercises powers that Congress may not exercise itself. Inclusion of the Secretary and Clerk as members of the Commission is therefore unconstitutional.[12]

a. By making them Commission members, the Act secures for these agents of Congress a comprehensive and impermissible means of influence over the Commission's decisionmaking. The FECA compels the Commission to afford the Secretary and Clerk an integral role in all its deliberative processes. By participating as members in the FEC's deliberations, the ex officio agents give Congress the ability to express its views from within the Commission on issues involving the execution and administration of the FECA in specific

[12] Respondents, in their brief in opposition, have indicated that they may raise in defense of the judgment two other claims rejected by the court of appeals below: that the absence of any statutorily specified removal authority unconstitutionally impairs the President's ability to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3; and that the statute unconstitutionally restricts the President's nomination power under the Appointments Clause by imposing restrictions on the party affiliation of appointments to the Commission. See 2 U.S.C. 437c(a)(1).

We believe that those issues were resolved correctly by the court of appeals. While the FECA is silent as to the President's power to remove commissioners, the court correctly reasoned that the Act may be construed to afford the President constitutionally sufficient removal power. Pet. App. 11a-12a. As to the alleged restriction on the President's appointment power, we also agree with the court of appeals that respondents lack standing to raise that claim, since it is impossible to determine in this case whether the bipartisanship requirement actually served to limit the President's choices. *Id.* at 8a-11a.

cases and instances.[13] Placement of the Secretary and Clerk on the Commission's membership also has the likely effect (as well as the apparent purpose) of causing the other commissioners to regard them as *colleagues* (rather than as members of a separate Branch of government) and to interact with them on that basis.[14] Although Congress has ample power to investigate or inform through legislative hearings or similar procedures, its attempt to *participate* (through its agents) in all the activities of the Commission constitutes a circumvention of the ordinary legislative role.

There is, of course, nothing illegitimate about efforts by members of one Branch to influence the decisions of the others. The continuous dialogue between the political Branches gives rise to numerous occasions for committees, Members, and agents of Congress to express their views to Executive Branch agencies concerning the administration and enforcement of

[13] As we explain above, see pages 11-14, *supra*, the ex officio members are entitled by statute to all of the prerogatives of membership not specifically proscribed. Moreover, even if the statute were construed to permit the voting members to exclude the Secretary and Clerk from their deliberations, the Act would place the burden of resisting all encroachment on the voting members of the Commission. Under the statute, the onus is plainly on those who would resist congressional access, rather than on those seeking access, a form of burden-shifting that reflects legislative encroachment.

[14] See also *1976 Hearings* 119 ("The power to be present and to participate in discussions is the power to influence. Normally, a judge, commissioner or juror, or even a corporate director, who is disqualified for conflict of interest, is expected to recuse himself not only from voting but from deliberations as well.") (testimony of Assistant Attorney General Scalia). That sort of structural defect is sufficient to violate the constitutional separation of powers.

federal law. Congress must engage in such advocacy, however, in a manner consistent with the structural limitations imposed by separation-of-powers principles. Frank interchange of views *between* the Branches is entirely consistent with these principles; but Congress may not attempt to assert its views from *within* the Executive Branch by creating for its agents positions as members of an agency exercising executive powers.[15]

b. Quite apart from the ability of the Secretary and Clerk to participate in and influence the Commission's decisionmaking processes, the presence of these officials as Commission members threatens to impede the voting commissioners in the independent exercise of their statutory responsibilities. The prospect that these congressional employees will report on FEC proceedings to Congress may cause the other members to "temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *United States* v. *Nixon*, 418 U.S. 683, 705-706 (1974); see also The Federalist No. 70, at 472 (Alexander Hamilton) (J. Cooke ed. 1961). For its law enforcement functions, in particular, a lack of confidentiality may cause the FEC to "shade [its] decisions instead of

[15] Certain constitutional provisions confer on one of the Branches a formal constitutional role in submitting its advice and recommendations to another Branch. See Art. II, § 2, Cl. 2 (the President shall have the power, "by and with the Advice and Consent of the Senate," to appoint officers and make treaties); Art. II, § 3 (the President "shall from time to time * * * recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient"). Neither of the constitutional provisions cited above, however, contemplates a procedure by which agents of one Branch will attempt to assert influence from *within* the other Branch. But see Art. I, § 3, Cl. 4 ("The Vice President of the United States shall be President of the Senate.").

exercising the independence of judgment required by [its] public trust." *Imbler* v. *Pachtman*, 424 U.S. 409, 423 (1976).[16] This lack of confidentiality may also impair the FEC's ability to gather information and otherwise perform its statutory mission if candidates for elective office are deterred from cooperating because of the presence and participation of congressional employees. Cf. *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 488 (Kennedy, J., concurring in the judgment).

4. Congressional participation in the Commission's decisionmaking processes also contravenes related constitutional principles. Although the Bill of Attainder Clause, U.S. Const. Art. I, § 9, Cl. 3, is not applicable here, its adoption reflects the Framers' determination to separate Congress's authority to prescribe generally applicable laws from the power to enforce and apply those laws in specific cases, which inheres in the Executive and the Judiciary. See *United States* v. *Brown*, 381 U.S. 437, 441-446 (1965). While Congress may proscribe particular types of conduct, it may not seek to determine whether its proscription has been violated in a particular

[16] In this respect, the analogy drawn by the court of appeals to the non-voting participation of alternate jurors is an apt one. Pet. App. 14a (citing Fed. R. Crim. P. 24(c)). Just as the presence of alternate jurors during jury deliberations may not be presumed to affect substantial rights of a litigant absent a specific showing of prejudice, see *United States* v. *Olano*, 113 S. Ct. 1770, 1779 (1993), it cannot be assumed that the potential influence of the ex officio members influenced this particular case. Nevertheless, it is readily apparent that alternate members might participate in jury deliberations, see *id.* at 1780-1781, and that their presence might exert an effect on the decisions of the regular jurors, *ibid.* (citing *United States* v. *Watson*, 669 F.2d 1374, 1391 (11th Cir. 1982), and *United States* v. *Allison*, 481 F.2d 468, 472 (5th Cir. 1973)).

case.[17] By making its agents members of an entity with executive powers, however, Congress by statutory command has inserted itself into deliberations regarding enforcement decisions in specific cases, retaining influence over the Branch charged with the execution of its laws.[18]

5. The statutory assignment of Members of Congress, or congressional agents, to positions within the other Branches poses risks not apparent in the assignment of executive or judicial officials to positions in a different Branch. Compare, *e.g.*, 20 U.S.C. 42 and 43 (ex officio membership of Chief Justice of the United States, among others, on Smithsonian Institution Board of Regents); 28 U.S.C. 991(a) (ex officio membership of Attorney General or her designee on the Sentencing Commission). Neither the Executive nor the Judicial Branch can compel the creation of positions benefitting its members.

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[17] See also *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 221 n.10 (1974) ("Congress can initiate inquiry and action, define issues and objectives, and exercise virtually unlimited power by way of hearings and reports, thus making a record for plenary consideration and solutions. The legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves.").

[18] Respondents have not contended that the ex officio membership of the Secretary and Clerk violates the Appointments Clause, and we accordingly express no view on the question. We note, however, that the inclusion of the Secretary and Clerk within an Executive Branch agency, and their potential to affect the outcome of the Commission's deliberations, might also support the contention that these officials (insofar as they act as members of the FEC) function as "Officers of the United States." If that contention were accepted, the placement of the Secretary and Clerk upon the Commission would also violate the Appointments Clause under the reasoning of *Buckley* v. *Valeo*.

The dangers of aggrandizement are therefore not so great when Congress assigns cross-Branch functions to members of other Branches as when Congress establishes positions in other Branches for its own Members or agents. See *Mistretta*, 488 U.S. at 382.[19]

II. THE PRIOR ACTS OF THE COMMISSION SHOULD BE ACCORDED DE FACTO VALIDITY, AND THE CIVIL PENALTY IMPOSED IN THIS CASE SHOULD ACCORDINGLY BE SUSTAINED

Although the membership of congressional agents on an executive body violates constitutional separation-of-powers principles, the civil penalty imposed in this case should nevertheless be sustained. In *Buckley*, this Court held that the Commission as then composed could not constitutionally exercise the substantial executive powers vested in it by the governing statute. The Court concluded, however, that

> the Commission's inability to exercise certain powers because of the method by which its members

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[19] In *Mistretta*, this Court principally considered whether the duties of the Sentencing Commission could be assigned to Article III judges removable from the Commission by the President. In addition, the Court addressed the question whether Congress could "requir[e] that those judges share their rulemaking authority with nonjudges." 488 U.S. at 384. The Court held that such a requirement was consistent with the Constitution. Had Congress appointed its own Members or agents to the Sentencing Commission, however, the case would have raised "the particular danger of the Legislative Branch's accreting to itself judicial or executive power." *Id.* at 382. That particular danger *does* arise from the membership of congressional agents on the Federal Election Commission.

> have been selected should not affect the validity of the Commission's administrative actions and determinations to this date * * *. The past acts of the Commission are therefore accorded *de facto* validity, just as we have recognized should be the case with respect to legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan.

424 U.S. at 142 (citing cases). This Court should follow the same course of action here.

A. In holding that the Commission's prior acts should be "accorded *de facto* validity," 424 U.S. at 142, despite the constitutional flaw in the appointment of its members, the decision in *Buckley* was in keeping with this Court's longstanding application of the "de facto officer" doctrine. See, *e.g.*, *Norton* v. *Shelby County*, 118 U.S. 425, 441-449 (1886); *Ball* v. *United States*, 140 U.S. 118, 128-129 (1891); *McDowell* v. *United States*, 159 U.S. 596, 601-602 (1895); *Waite* v. *Santa Cruz*, 184 U.S. 302, 323 (1902). Under that doctrine, a "person actually performing the duties of an officer under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned." *United States ex rel. Doss* v. *Lindsley*, 148 F.2d 22, 23 (7th Cir.), cert. denied, 325 U.S. 858 (1945).

The de facto officer doctrine "is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby." *Norton*, 118 U.S. at 441. Accord *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981) ("The *de facto* officer doctrine was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently

occupying government offices could later be invalidated by exposing defects in the officials' titles."). These concerns are directly applicable to the present case.

B. In one significant respect this Court's de facto officer doctrine cases are distinguishable from more recent decisions such as *Buckley*. Where the de facto officer doctrine has been applied, the Court has typically declined to address the legal validity of the officer's appointment or election, on the theory that the purported unlawfulness of the officer's selection furnished no basis for a "collateral attack" on his acts in office. *Ball*, 140 U.S. at 129; see also *McDowell*, 159 U.S. at 601-602; *Lindsley*, 148 F.2d at 23; *Ryan* v. *Tinsley*, 316 F.2d 430, 432 (10th Cir.), appeal dismissed, cert. denied, 375 U.S. 17 (1963). In more recent decisions, by contrast, the Court has addressed and decided issues concerning the legality of the challenged officers' appointment or exercise of power, but has determined that its decision should be given prospective effect only. See, *e.g.*, *Buckley* v. *Valeo*, *supra*; *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (plurality opinion); *id.* at 92 (Rehnquist, J., concurring in the judgment); see also *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-109 (1971); *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 422 (1964).

In determining that those decisions should be given prospective application, the Court has invoked considerations closely related to those that underlie the de facto officer doctrine. In *Northern Pipeline*, for example, the plurality explained that retroactive application of its holding "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." 458 U.S. at 88; see also *id.* at 92 (Rehnquist, J., concurring in the judgment).

Respondents in the present case do not quarrel with the manner in which the Commission processed their case; rather, as in *Buckley* and *Northern Pipeline*, they assert a *systemic* challenge to the composition of the governmental body. As in those cases, retroactive application of a decision in their favor would call into question a substantial number of actions taken by the Commission over a prolonged period of time. The public interest in effective enforcement of federal campaign laws weighs strongly against this result.

Moreover, prospective application of the Court's decision would not be inequitable to respondents. Respondents do not contend, and the court of appeals did not suggest, that the presence of the Secretary and Clerk somehow tilted the Commission's proceedings in this case in a manner adverse to their interests. "Indeed, [respondents] have not alleged that the Secretary and the Clerk were even present for or participated in the proceedings in question." Pet. App. 26a. Nor is there any reason to believe that the membership of the Secretary and Clerk would, as a general matter, disserve the interests of private parties such as respondents.

It bears noting, in addition, that the present case involves a challenge to the Commission's prosecutorial rather than adjudicative functions. Respondents do not contest the impartiality or constitutional qualifications of the district judge who, in adjudicating the Commission's complaint, found the existence of a statutory violation and determined an appropriate civil penalty. They argue instead that the proceeding was tainted because the agency that brought the action was improperly constituted. Any connection between the Commission's unlawful composition and the judgment ultimately entered against respondents by the district

court is far too attenuated to outweigh the public interest in effective implementation of the federal election laws.[20]

C. The legitimacy of prospective judicial decision-making has, we recognize, recently been called into question. In *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529 (1991), Justices Souter and Stevens expressly reserved the question whether such "pure" prospectivity was permissible, *id.* at 544, although they acknowledged that in a few prior cases the Court had followed this course, *id.* at 536 (citing, *inter alia*, *Buckley* v. *Valeo*). The Chief Justice and Justices White, O'Connor, and Kennedy would have held in *James Beam* that the Court could decline, in an appropriate case, to apply newly announced rules of law to the parties before it, see *id.* at 544-547 (White, J., concurring in the judgment), 549-559 (O'Connor, J., dissenting); Justices Blackmun, Marshall, and Scalia would have held that it could not, *id.* at 547-548 (Blackmun, J., concurring in the judgment), 548-549 (Scalia, J., concurring in the judgment).[21]

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[20] Cf. *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 248 (1980) ("The rigid [conflict-of-interest standards], designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity."); *id.* at 248-250.

[21] Somewhat different issues are raised by the practice of "selective prospectivity," by which a court "appl[ies] a new rule in the case in which it is pronounced, then return[s] to the old one with respect to all others arising on facts predating the pronouncement." *James Beam*, 501 U.S. at 537 (opinion of Souter, J.). Selective prospectivity "breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally." *Ibid.* The Court has definitively rejected this practice, holding that "[w]hen [the Supreme] Court applies a rule of federal law to the

Unless and until the Court's prior decisions employing pure prospectivity are overruled, established law makes clear that this course of action is permissible in appropriate situations.[22] In our view, prospective application of a judicial decision can be an essential means of preventing unjustified disruption of settled expectations, while ensuring that important legal questions do not remain unresolved. Such an approach is particularly suitable in cases like the present one. Respondents raise a systemic challenge to the composition of a governmental body, such that retroactive application of a decision in their favor would substantially disrupt the implementation of federal election law; yet the asserted flaw in the FEC's composition is not one that could realistically be supposed to have disserved their interests. Under these circumstances the Court should, as it did in *Buckley*, accord de facto validity to the Commission's prior actions.[23]

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parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule." *Harper* v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993).

[22] In the instant case, the court of appeals (without citing *James Beam* or acknowledging the existence of prior decisions employing pure prospectivity) simply stated that "we are aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case." Pet. App. 18a. In light of this Court's precedents, that reasoning is plainly inadequate.

[23] This Court has reserved the use of pure prospectivity for decisions that "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106 (citation omitted). The court of appeals acknowledged that this Court "has not considered the circumstances of this case," since prior separation-of-powers disputes involved the grant of "explicit voting or decisionmaking power that is not present here." Pet. App. 15a. Although we believe that this distinction does not save the statute from constitutional attack, see pages 15-21, *supra*, the invalidation of the challenged provision cannot be said to have been "clearly foreshadowed" by this Court's prior decisions.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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